

No. 84-68-CFX
Status: GRANTED

Title: Kerr-McGee Corporation, Petitioner
v.
Navajo Tribe of Indians, et al.

Docketed:
July 12, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Shrago, Alvin H.

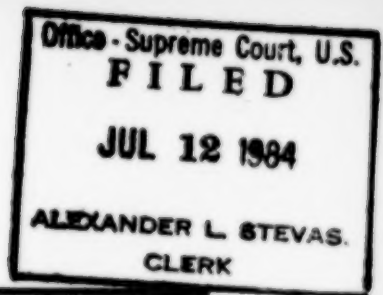
Counsel for respondent: Bernstein, Elizabeth

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 1 | Jul 12 1984 | G | Petition for writ of certiorari filed. |
| 2 | Jul 31 1984 | | Brief amicus curiae of Salt River Proj. Agricultural Improvement and Power Dist filed. |
| 3 | Jul 31 1984 | | Brief amicus curiae of Arizona Public Service Co., et al. filed. |
| 4 | Jul 31 1984 | | Brief amicus curiae of Phillips Petroleum Company, et al. filed. |
| 5 | Aug 3 1984 | | Brief amicus curiae of Conoco Inc., et al. filed. |
| 6 | Aug 16 1984 | | Brief of respondent Navajo Tribe of Indians in opposition filed. |
| 7 | Aug 22 1984 | | DISTRIBUTED. September 24, 1984 |
| 9 | Oct 1 1984 | | REDISTRIBUTED. October 5, 1984 |
| 10 | Oct 9 1984 | | Petition GRANTED. ***** |
| 11 | Nov 21 1984 | | Brief amicus curiae of Peabody Coal Co. filed. |
| 12 | Nov 21 1984 | | Brief amicus curiae of Salt River Proj. Agricultural Improvement & Power Dist. filed. |
| 13 | Nov 23 1984 | | Brief amicus curiae of Phillips Petroleum Company filed. |
| 14 | Nov 23 1984 | | Brief amicus curiae of AZ Public Serv. Co., et al. filed. |
| 15 | Nov 23 1984 | | Joint appendix filed. |
| 16 | Nov 23 1984 | | Brief of petitioner Kerr-McGee Corp. filed. |
| 17 | Nov 23 1984 | | Brief amicus curiae of Texaco, Inc. filed. |
| 18 | Nov 28 1984 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 19 | Dec 10 1984 | | Motion of the Solicitor General for leave to participate in oral GRANTED. |
| 20 | Dec 7 1984 | | Record filed. |
| 21 | Dec 7 1984 | | Certified copy of original record & C.A. proceedings, 3 volumes, received. |
| 22 | Dec 20 1984 | | Brief amicus curiae of United States filed. |
| 23 | Dec 21 1984 | | Lodging received. To be returned to the Department of Justice. |
| 24 | Dec 26 1984 | | Brief amicus curiae of Assn. of American Indian Affairs, Inc., et al. filed. |
| 25 | Dec 26 1984 | | Brief amicus curiae of Shoshone Indian Tribe, et al. filed. |
| 26 | Dec 28 1984 | | Brief of respondents Navajo Tribe of Indians, et al. filed. |
| 28 | Dec 28 1984 | | LODGING. Copy of Title 24, Navajo Tribal Code, Sections 401-445. |
| 29 | Dec 26 1984 | | Brief amicus curiae of Sac and Fox Tribe of Indians of OK |

| Entry | Date | Note | Proceedings and Orders |
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| 30 | Dec 28 1984 | | 10 copies of LODGING received. |
| 31 | Jan 4 1985 | | SET FOR ARGUMENT. Monday, February 25, 1985. (3rd case.) |
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| 33 | Jan 30 1985 | X Reply | brief of petitioner Kerr-McGee Corp. filed. |
| 34 | Feb 25 1985 | | ARGUED. |

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(1)



No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

- I. CAN INDIAN TRIBES WHICH HAVE REFUSED TO BECOME ORGANIZED UNDER THE INDIAN RE-ORGANIZATION ACT OF 1934 AND WHICH HAVE REFUSED TO ADOPT TRIBAL CONSTITUTIONS UNILATERALLY IMPOSE TAXES ON NON-INDIANS WITHOUT APPROVAL FROM THE SECRETARY OF THE INTERIOR?
- II. CAN UNORGANIZED INDIAN TRIBES ASSERT AUTHORITY OVER NON-INDIAN OIL AND GAS LESSEES WHEN THE CONTROLLING ACT OF CONGRESS PERMITS THE EXTENSIVE FEDERAL REGULATION TO BE SUPERSEDED ONLY BY ORGANIZED INDIAN TRIBES, IN ACCORDANCE WITH THE PROVISIONS OF THEIR TRIBAL CONSTITUTIONS?

* Pursuant to the provisions of Rule 28.1, Rules of the Supreme Court of the United States, the following is a list of all subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner Kerr-McGee Corporation: Kerr-McGee Oil (U.K.) Ltd.; San-Ann Premium Center, Inc.; Sunningdale Oils (Abu Dhabi), Ltd.; Sunningdale Oils (Ireland), Ltd.; Transocean Drilling Company, Ltd.; Transocean Drilling (Curacao) N.V.; Transhore Drilling (Curacao) N.V.; Transworld Drilling Company (Nigeria), Ltd.; White Shoal Pipeline Corporation; Basic Management, Inc.; Bikita Minerals (Private), Ltd.; Crescent Petroleum Company; Downtown Airpark, Inc.; Little Medicine Development Co.; Oklahoma Stations, Inc.; San-Ann Service, Inc.; and Texoma Pipe Line Company.

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No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner Kerr-McGee Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on April 17, 1984. The respondents to this petition for writ of certiorari will be the tribal officials who were appellants and cross-appellees before the Ninth Circuit — namely, tribal chairman Peterson Zah and the director and members of the Navajo Tax Commission: Delfred Wauneka, Robert Shorty, Jr., Glenn George and William Morgan, Jr.

OPINIONS BELOW

The opinion of the Court of Appeals in *Kerr-McGee Corp. v. Navajo Tribe of Indians, et al.*, is reported at 731 F.2d 597. (App. A, *infra*, at 1-12). The opinion of the District Court was not reported. (App. B, *infra*, at 1-23).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. United States Code, Title 25:

Section 636. Adoption of Constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

2. United States Code, Title 25:

Section 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

3. United States Code, Title 25:

Section 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or

band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Section 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the rights of tribes organized and incorporated under Sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471, 473, 474, 475, 476 to 478, and 479 or this title.

Section 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the

Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

4. Code of Federal Regulations, Title 25:

Section 211.29. Exemption of leases made by organized tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

STATEMENT OF THE CASE

Encompassing an area larger than the States of Connecticut, Delaware, Massachusetts, New Jersey and Rhode Island, the Navajo Indian Reservation occupies over 24,000 square miles of land set aside by treaty, statute and executive order in the States of Arizona, New Mexico and Utah. The Navajo Tribe has never adopted a Constitution despite the fact that Congress twice invited it to do so. It refused to become organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and it also refused to become organized under Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636.

Petitioner extracts oil and gas from certain lands of the Navajo Indian Reservation in Arizona¹ set aside by treaty pursuant to five valid and binding leases issued by the Navajo Tribe and approved by the Secretary of the Interior. The first of these leases was issued in 1964. In 1978, the Navajo Tribal Council adopted a "Business Activity Tax" and a "Possessory Interest Tax." Both of these taxes purport to empower the Navajo Tax Commission to impose a number of penalties in the event of noncompliance, including "permanent loss of all right to engage in productive activity" on the reservation. Neither of these taxes was ever approved by the Secretary of the Interior.

The Business Activity Tax purports to require petitioner: (1) to file declarations of tax due on February 15, May 15, August 15 and November 15 of each calendar year, (2) to pay taxes purportedly due on the said dates, and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax purports to be effective as of July 1, 1978, and purports to apply to every sale, either within or without the reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%).

The Possessory Interest Tax purports to require petitioner: (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one-half (1/2) due on February 15 and one-half (1/2) due on August 15 of each calendar year. The tax purports to apply to every leasehold interest on or under the reservation that has a value in excess of \$100,000 at a rate of

¹ Petitioner, through its wholly-owned subsidiary Quivira Mining Company, also mines uranium from certain lands of the Navajo Indian Reservation in New Mexico set aside by executive order; however, the issue as to validity of tribal taxation of these activities is still pending in the United States District Court for the District of New Mexico. See footnote 2, *post*, and accompanying text.

not less than one percent (1%) nor greater than ten percent (10%) of the leasehold value.

On May 10, 1979, petitioner filed its complaint in the United States District Court for the District of New Mexico against the Navajo Tribe, the Navajo Tax Commission, the tribal chairman and the members of the tribal tax commission, seeking a declaration that the tribal Business Activity Tax and Possessory Interest Tax were void and invalid, as well as an injunction enjoining any enforcement of these taxes. Petitioner alleged that the respondent tribal officials, by seeking to enforce the taxes, were acting beyond the limits of their lawful tribal authority. Jurisdiction was asserted under 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

On September 27, 1979, the Honorable E. L. Mechem dismissed petitioner's claims against the Navajo Tribe and the Navajo Tax Commission on the basis of tribal sovereign immunity. On March 12, 1980, Judge Mechem transferred, over petitioner's objections, petitioner's action insofar as it pertained to petitioner's oil and gas leases in Arizona to the United States District Court for the District of Arizona.²

All activity in the Arizona district court was stayed pending resolution by this Court of the then pending case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). After the *Merrion* decision was released, the Arizona district court entertained motions for summary judgment that had been filed by both petitioner and respondents. On June 29, 1982, the Honorable William P. Copple rendered his memorandum and order (App. B at 1-23) which granted summary judgment in favor of petitioner³ on the basis that the Business Activity Tax and the Possessory Interest Tax were void

² The portion of petitioner's action relating to the New Mexico uranium leases was retained in the United States District Court for the District of New Mexico, which stayed the action on its own motion over petitioner's objections.

³ Judge Copple also rejected all of the other claims asserted by petitioner.

and invalid because they had not been approved by the Secretary of the Interior. In addition to holding that the respondents were collaterally estopped from relitigating the validity of these taxes in view of the declaration of their invalidity by the United States District Court for the District of Utah in *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D.Utah),⁴ Judge Copple also held that *Merrion* requires all tribes to obtain approval from the Secretary of the Interior before they can impose taxes on non-Indians.

The respondents appealed this determination to the Ninth Circuit Court of Appeals. Petitioner filed a cross-appeal of the district court's rejection of the federal pre-emption, treaty limitations on tribal power and commerce clause claims. The United States filed an *amicus curiae* brief in support of the respondents' position, and urged that Secretarial approval was not required for tax ordinances imposed by Indian tribes that have no Constitutions and that have refused to become organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.⁵ Oral argument was held in San Francisco on April 15, 1983. Later that day, the three

⁴ Since the district court relied in part on the Utah decision, a copy of that unreported decision is set forth in App. C, *infra*, at 1-14, in accordance with Rule 21.1(k) (ii), Rules of the Supreme Court.

⁵ On the other hand, in response to questions raised by Chief Justice Burger during the November 4, 1981 oral argument in *Merrion v. Jicarilla Apache Tribe*, the United States represented to this Court that the statutes setting forth the general responsibility of the Secretary to supervise relations between Indians and non-Indians vest the Secretary with authority to approve — and to disapprove — tribal exercises of civil jurisdiction over non-Indians:

At all events, I would suggest that there remains residual power in the Secretary under Section 2 of Title 25, Section 9, to disapprove, and certainly to refuse to implement any ordinance enacted by a tribe which bears on others than members, and which he has not approved and would affirmatively disapprove, that that residual power could be exercised in any such case.

Transcript of Oral Argument at 43. Why the United States is now repudiating these representations should be addressed by this Court.

judge panel deferred submission pending decision by the Tenth Circuit Court of Appeals in the *Southland Royalty Co.* case.

On August 22, 1983, the Tenth Circuit reversed the determination by the federal district court in Utah that the respondents' taxes required Secretarial approval. *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir.). That case is still pending, however, before the Tenth Circuit Court of Appeals on a petition for rehearing en banc.

The Ninth Circuit rendered its decision on April 17, 1984. The three judge panel — apparently disregarding this Court's holding in *Merrion* that secretarial approval was necessary to "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies," 455 U.S. at 141 — held that

Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters.

App. A at 12. In addition, the panel rejected petitioner's pre-emption claim by holding that — notwithstanding the *explicit* distinction between organized and unorganized tribes that Congress drew in 25 U.S.C. § 396b — the purpose of that legislation

was not to generate distinctions between tribes organized under the IRA and tribes not so organized. . . .

App. A at 6.

REASONS FOR GRANTING THE WRIT
I. THE DECISION BELOW CONFLICTS WITH
THE DECISION OF THIS COURT IN MERRION
v. JICARILLA APACHE TRIBE

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court held that with approval from the Secretary of the Interior, the Jicarilla Apache Tribe, which had adopted a Constitution in accordance with section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, could impose a severance tax on non-Indian production of oil and gas on the reservation. Justice Marshall explained that while "neither the Tribe's Constitution nor the federal Constitution is the font of any sovereign power of the Indian tribes," *Id.* at 148 n.14, an amendment to the tribal constitution authorizing the tax was "the critical event necessary to effectuate the tax." *Id.* (emphasis by the Court). The Court could not possibly have been more explicit in holding that adoption of a Constitution under the Indian Reorganization Act announcing tribal intention to tax non-members, as well as Secretarial approval of the tribal tax, were part of "the administrative process established by Congress to monitor such exercises of tribal authority":

Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax non-members. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary.

455 U.S. at 155. Indeed, in distinguishing tribal taxation from federal and state taxation, this Court explained that:

These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any

exercise of the tribal power to tax will be consistent with national policies.

Id. at 141.

The Ninth Circuit, however, did not even bother to address these holdings. Instead, it held, without a single citation of authority, that "Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters." (App. A at 12). In short, the Ninth Circuit declined to follow this Court's holdings (1) that "Congress has affirmatively acted by providing a series of federal check-points that must be cleared before a tribal tax can take effect", (2) that authorization to tax in a tribal constitution is "the critical event necessary to effectuate the tax," and (3) that Secretarial approval was necessary to minimize the "potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies." According to the Ninth Circuit, an unorganized Indian tribe, if it so desires, may unilaterally impose an unfair and unprincipled tax totally at odds with national policies.⁶

⁶ The Ninth Circuit's decision below is inconsistent with an extensive line of cases in which tribal ordinances have been approved by the Secretary. *E.g.*, *Rice v. Rehner*, ____ U.S. ____, 77 L.Ed.2d 961 (1983); *New Mexico v. Mescalero Apache Tribe*, ____ U.S. ____, 76 L.Ed.2d 611 (1983); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In fact, there was Secretarial approval or organization under the Indian Reorganization Act of 1934 in each of the lower court decisions on which the majority in *Merrion* had relied: *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); and *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958).

II. THE DECISION BELOW CONFLICTS WITH THE CONTROLLING ACT OF CONGRESS AND EMASCULATES THE EXTENSIVE FEDERAL SCHEME OF SUPERVISION OVER RELATIONS BETWEEN INDIANS AND NON-INDIANS

Under the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.*, all oil and gas leases between Indians and non-Indians must be approved by the Secretary. Without Secretarial approval, the leases themselves are invalid. *See, e.g., Lawrence v. United States*, 381 F.2d 989 (9th Cir. 1967). In addition, Congress has placed the responsibility for continuing supervision and regulation of these leases in the Secretary. 25 U.S.C. § 396d and 25 C.F.R. Part 211. Incredibly, the Ninth Circuit's decision below allows the Navajo Tribe *unilaterally* to tax and regulate⁷ oil and gas lessees with whom it could not have even contracted in the absence of Secretarial approval.

The Court held in *Merrion* that there had been no preemption of the Jicarilla Apache Tribe's power to tax non-Indian oil and gas production because the Congressionally mandated procedure for oil and gas leasing contained an exception for those tribes which had adopted Constitutions or Charters under the Indian Reorganization Act:

However, the proviso to 25 U.S.C. § 396b states that "the foregoing provisions *shall in no manner restrict the right of tribes . . . to lease lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant*

⁷ For example, 25 C.F.R. § 211.27 permits leases to be cancelled only by the Secretary. *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.), *cert. denied*, 52 U.S.L.W. 3461 (1983) (holding that only the Secretary can terminate a commercial lease issued with Secretarial approval pursuant to 25 U.S.C. § 415). However, both the Business Activity Tax (Section 26) and the Possessory Interest Tax (Section 17) purport to authorize the Navajo Tribe *unilaterally* to terminate petitioner's oil and gas leases by means of "permanent loss of all rights to engage in productive activity with the Navajo Nation."

to sections 461, 462, 463, [464-475, 476-478], and 479 of this title," (emphasis added). Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised constitution and the ordinance authorizing the tax are approved by the Secretary.

455 U.S. at 150 (emphasis by the Court).

The Ninth Circuit, however, refused to acknowledge the exceptions explicitly set forth by the Congress in 25 U.S.C. § 396b for tribes which had adopted constitutions or charters under the Indian Reorganization Act. It attempted to explain that the purpose of 25 U.S.C. § 396b

was not to generate distinctions between tribes organized under the IRA and tribes not so organized, but rather was to "bring all mineral leasing matters in harmony with the Indian Reorganization Act."

App. A at 6. This statement — totally aside from its disregard of the distinction between organized and unorganized tribes explicitly drawn by Congress in the statute itself — incredibly attempts to achieve "harmony" with the Indian Reorganization Act by permitting *unorganized* tribes to exercise *without* Secretarial approval those powers that Congress permitted only *organized* tribes to exercise *with* Secretarial approval. The Ninth Circuit's decision below, if permitted to stand, will effectively emasculate the extensive scheme of federal supervision and approval that the Con-

gress has established for the entire gamut of dealings between Indians and non-Indians.⁸

III. THE DECISION BELOW RAISES SERIOUS AND RECURRING PROBLEMS

A. The Decision Below Raises Serious And Recurring Problems Concerning Fundamental Fairness And Basic Liberties on Indian Reservations

After *Merrion v. Jicarilla Apache Tribe*, *supra*, the lower federal courts have upheld increasing tribal assertions of civil authority over non-Indians. See, e.g., *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3860 (1984) (upholding a tribal tax and licensing scheme that penalized employers with non-Indian employees); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, _____ U.S. _____, 74 L.Ed.2d 277 (1982) (upholding tribal building and health regulations imposed on non-Indians occupying non-Indian land); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (upholding application of tribal zoning code to non-Indian owned lands). Moreover, although *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), prohibited the exercise of tribal criminal authority over non-Indians, tribes are now characterizing their legislation as "civil" instead of "criminal" when they seek to apply it to non-

⁸ See, e.g., 25 U.S.C. § 81 (contracts between Indian tribes and non-Indians), § 81a and b (contracts between Indian tribes and lawyers for prosecution of claims against United States), § 84 (assignment of contracts), § 85 (contracts regarding tribal funds and property in the hands of the United States), §§ 261 and 262 (regulation of Indian traders), §§ 311, 312, 319, 321 and 323 (rights-of-way), § 320 (acquisition of Indian lands for reservoirs and materials), § 379 (sale of allotted lands), §§ 396a-g and 399 (leasing of Indian lands for mining purposes), § 397 (leasing of Indian lands for oil and gas purposes), § 402a (leasing of Indian lands for farming purposes), §§ 406 and 407 (sale of timber on Indian lands), § 415 (lease of Indian lands for public, religious, educational, recreational, residential, business, and other purposes), and § 452 (contracts with the States for education, medical attention, relief and social welfare of Indians).

Indians. For example, in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3720 (1984), the Ninth Circuit held that the Navajo Tribe could punish certain activity engaged in by an Indian as a "criminal offense," while punishing the same activity engaged in by a non-Indian as a "civil offense." Obviously, it is now more important than ever before that this Court address federal supervision and control over what appear to be quantum leaps in the exercise by Indian tribes of "civil" jurisdiction over non-Indians.

The concern for fairness in the context of tribal assertions of civil authority over non-Indians is serious and compelling. Indian tribes, unlike every other governmental authority in the United States, are not subject to the constraints on the exercise of governmental authority set forth in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). In fact, widespread abuses of tribal power caused the Congress to enact the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*, which by statute purported to extend the protections of the Bill of Rights to persons affected by the exercise of tribal authority.⁹ See *Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations pursuant to S.Res. 194, 89th Cong., 2d Sess., p. 3, 4, 5 (1966).*

Nevertheless, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court held that the protections that were supposed to be afforded by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*, are incapable of enforcement because the Act did not waive tribal sovereign immunity, 436 U.S. at 59, and because violations of the Act do not give

⁹ In fact, the Congress was particularly concerned about such abuses by the Navajo Tribe, as reflected in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (Navajo Tribe may enact ordinances violating the right of freedom of religion because the First Amendment is inapplicable to the Navajo Tribe).

rise to implied private rights of action against either the tribe or the tribal officials. *Id.* 69-70. The Ninth Circuit¹⁰ has followed *Santa Clara Pueblo* by absolutely refusing to entertain any claims of tribal violations of the "protections" set forth in the Indian Civil Rights Act of 1968. *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980). The only "protection" under the Indian Civil Rights Act of 1968 is a writ of *habeas corpus*, which as Justice White noted in *Santa Clara Pueblo*, *supra*, "is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property." 436 U.S. at 75 n.3 (dissenting). As Justice Stevens predicted in *Merrion*, *supra*, "Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community." 455 U.S. at 170 (dissenting). Without meaningful federal supervision and control, tribal exercises of unfair or unprincipled "civil" jurisdiction will inevitably lead to intolerable conflict between Indians and non-Indians.

B. The Decision Below Raises Serious And Recurring Problems Concerning The Organization Of, And Federal Supervision Over, Tribal Governments.

The effect of the Ninth Circuit's decision below is to reward those Indian tribes which have rejected the Indian Reorganization Act and which have refused to adopt a Constitution by vesting them with the ability to exercise absolute and unlimited civil authority over non-Indians without any federal supervision or control at all. Obviously, the need for Secretarial approval is more pressing with those

¹⁰ On the other hand, the Tenth Circuit, in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), has held that the limitations placed by this Court on claims arising under the Indian Civil Rights Act of 1968 "disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian." *Id.* at 685.

tribes which have not adopted any constitution, since the "potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner . . .", *Merrion*, *supra*, 455 U.S. at 141, is most pronounced in those cases.

Moreover, the decision below will serve only to encourage the vast majority of Indian tribes which have responsibly organized their governments and adopted Constitutions in accordance with section 16 of the Indian Reorganization Act to *disorganize* their governments and to *repudiate* their Constitutions and the Indian Reorganization Act. Once that is done, then under the Ninth Circuit's decision below, federal supervision and control is eliminated. Needless to say, the result is total emasculation of the Indian Reorganization Act. As Justice Stevens noted in *Merrion*, *supra*,

To the extent that the power to tax was an attribute of sovereignty possessed by Indian tribes when the Reorganization Act was passed, Congress intended the statute to preserve those powers for all Indian tribes that adopted a formal organization under the Act.

455 U.S. at 173 n.24 (dissenting) (emphasis added). To hold now that the power to tax may be exercised by tribes that have rejected formal organization under the Indian Reorganization Act is to hold, in effect, that the enactment by Congress of that legislation was, at best, a complete nullity, and at worst, an act of Congressional deceit to mislead most Indian tribes into voluntarily surrendering tribal powers by organizing under legislation touted to them as strengthening tribal powers.

IV. CONCLUSION

Because non-Indians have no recourse at all as to tribal exercises of unlimited civil authority, close federal supervision and approval is essential. That is precisely why Congress erected the federal checkpoints in the Indian Reorganization Act of 1934 and why this Court confirmed that federal approval of tribal taxes was necessary in *Merrión v. Jicarilla Apache Tribe*, which the Ninth Circuit declined to follow.

Eliminating federal supervision precisely where it is most urgently needed, the Ninth Circuit's decision below emasculates the entire federal supervisory scheme over relations between Indians and non-Indians. In addition, it trivializes the Indian Reorganization Act of 1934 by rewarding those Indian tribes which have resisted its policy of tribal organization under a Constitution. Thus, the ineluctable result of the Ninth Circuit's decision below is that every Indian tribe that has followed the Congressional policy of the Indian Reorganization Act and has adopted a Constitution will now be encouraged to disorganize, to abandon their Constitutions and to forsake the Indian Reorganization Act so as to circumvent the Congressionally established scheme of extensive federal supervision over Indian/non-Indian relations that dates back to the very beginnings of this Nation.

This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review, and to reverse summarily, its decision below.

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July 1983

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**KERR-McGEE CORPORATION, a
Delaware corporation,**

Plaintiff-Appellee,

vs.

NAVAJO TRIBE OF INDIANS,

Defendant-Appellant.

No. 82-5725

**USDC No. CV 80-247
PHX WPC**

**KERR-McGEE CORPORATION,
a Delaware corporation,**

Plaintiff-Appellant,

vs.

**NAVAJO TRIBE OF INDIANS, a
tribe of American Indians
recognized by the United States
Department of the Interior, et al.,**

Defendants-Appellees.

No. 82-5736

USDC No. CIV 80-247

OPINION

**On Appeal from the United States District Court for
the District of Arizona
Honorable William P. Copple, Presiding**

Argued: April 15, 1983

Submitted: August 22, 1983

Decided: April 17, 1984

**Before: MERRILL, SKOPIL and FERGUSON, Circuit
Judges.**

MERRILL, Circuit Judge.

Kerr-McGee Corporation is a Delaware corporation engaged in business in New Mexico and Arizona. The Navajo Tribe of Indians is a tribe of American Indians situated upon a reservation created in part by treaty and in part by executive order in the states of Arizona, New Mexico, and Utah. The Tribe has no written constitution, but its self-governing powers are vested in the Navajo Tribal Council.

Kerr-McGee is a non-Indian mineral lessee of the Tribe. Since 1964, it has, under leases approved by the Secretary of the Interior, engaged in mining uranium and extracting oil and gas from portions of the Navajo reservation in New Mexico and Arizona. In 1978, the Tribal Council adopted two new taxes directly affecting the Kerr-McGee operations: a tax presently set at 3% on the value of mining leasehold interests on reservation lands of a value in excess of \$100,000 (the Possessory Interest Tax) and a tax presently set at 5% on the gross receipts of certain business activities conducted on the reservation, including every sale within or without the reservation of a "Navajo good or service" (the Business Activities Tax).

By this action Kerr-McGee seeks to invalidate the taxes. In its complaint it charges that for many reasons the Tribal Council was without power to impose such taxes on non-Indians. The District Court rejected most of Kerr-McGee's contentions and granted summary judgment in favor of the Tribe on the counts of the complaint on which those contentions were based. Kerr-McGee has appealed from that judgment. The Court did, however, hold that the taxes were nevertheless invalid because the Tribe had not secured the approval of the tax by the Secretary of the Interior, an action which the Court held to be a requirement. It granted summary judgment in favor of Kerr-McGee on the count asserting that ground for invalidity. The Tribe has appealed from that judgment.

In its judgments the District Court in all respects followed the holding of the District Court for the District of Utah in the case of *Southland Royalty Co. v. Navajo Tribe of Indi-*

ans, No. 79-0140 (D. Utah, March 8, 1979). That case involved the precise questions presented here: the validity of the Tribal taxes on oil and gas leases and on gross receipts. The decision in that case was appealed to the Court of Appeals for the Tenth Circuit and that Court has now affirmed the Utah District Court on those portions of the judgment favoring the Navajo Tribe but has reversed the Utah District Court in its holding that approval of the tax by the Secretary of the Interior was required. *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983).

KERR-McGEE APPEAL

I. Inherent Power to Tax Lessees—

In Count I of its amended complaint Kerr-McGee asserts that, as to it, the Tribe is without the inherent power to tax; that by virtue of its leasehold Kerr-McGee has a right to presence within the reservation and cannot be excluded by the Tribe and that the Tribe, having no power to exclude, has no power to tax.

The Supreme Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), has held otherwise. It has made it clear that Indian tribes do have the inherent power to tax mining activities carried on within the reservation under lease from the tribes; that the power to tax is an essential attribute of Indian sovereignty and a necessary instrument of self-government. "[The power to tax] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137. The Court makes it clear that Kerr-McGee's status as lessee does not deprive the Tribe of power to tax it; that such power is inherent in sovereignty and does not stem exclusively from the power to exclude one from tribal lands. Moreover, as the Court acknowledged in *Merrion*, the Tribe's interest in levying taxes for essential governmental programs on nonmembers

"is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" 455 U.S. at 138, quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980). If the Tribe's interest was found sufficiently strong in the case of the oil and gas severance taxes in *Merrion*, they can be no less strong here.¹

Since *Merrion* there can be no question that the Navajo Tribe has the inherent power to tax the mineral leases and operation of Kerr-McGee.

II. Treaties of 1850 and 1868—

In Count II of its amended complaint Kerr-McGee alleges that both the Treaty of 1850, 9 Stat. 974, and the Treaty of 1868, 15 Stat. 667, bar the Navajo Tribe from taxing non-Indians.

With respect to the Treaty of 1850, Kerr-McGee asserts that Article III surrenders all civil jurisdiction to the United States. That provision states in relevant part:

The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajos . . .

9 Stat. at 974. Yet this language does no more than recite that it is the federal government, and not the states, that possesses regulatory power over commerce and trade with the Tribe. That federal exclusivity of power as to the states does not undermine the ability of the Tribes to legislate in areas of retained sovereignty, unless Congress legislates to the contrary. See *Santa Clara Pueblo v. Martinez*, 436 U.S.

¹ The Court points out that in *Washington v. Confederated Tribes of Colville Indian Reservation*, *supra*, it "noted that official executive pronouncements have repeatedly recognized that 'Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands . . . including the jurisdiction to tax.'" 447 U.S. at 139. The Court notes that both the executive and legislative branches have "acknowledged that the tribal power to tax is one of the tools necessary to self-government and territorial control." *Id.*

49 (1978). In that context, there is nothing in the quoted Treaty language which would inhibit the Navajo's taxation of non-Indians. See *United States v. Wheeler*, 435 U.S. 313 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983).

With respect to the Treaty of 1868, Kerr-McGee asserts that Article IX expressly prohibits Tribe interference with its oil and gas operations. That provision states:

[The Tribe] will not in future oppose the construction of railroads, wagonroads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States.

15 Stat. at 670. Kerr-McGee argues that its oil and gas operations are works of utility and that by taxing its operations, the Tribe "opposes" them. We find this argument wholly without merit. Placed in context, it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe, and not with its power to tax.²

² In the Treaty of 1868, the Tribe agrees to cease hostilities:

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, not attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; . . .

We note additionally that Kerr-McGee cites no authority, and we are aware of none, that equates oil and gas operations with a "work of utility" for the purposes of the Treaty. Kerr-McGee's reliance on *United States v. Andrews*, 179 U.S. 96 (1900), which finds the Chishom Trail to be a work of utility such that cattle-rustling was violative of the Treaty, is inapposite.

III. The Mineral Leasing Act of 1938—

In Count III of its amended complaint, Kerr-McGee asserts that the Mineral Leasing Act of 1938 has preempted all power of the Navajo Tribe to tax non-Indians. The Act, 25 U.S.C. § 396 *et. seq.*, provides in part at § 396d: "All operations under any oil, gas, or other mineral lease issued pursuant to the terms [of any act affecting restricted Indian lands] shall be subject to the rules and regulations promulgated by the Secretary of the Interior." The regulatory procedure set up pursuant to the Act is set forth at 25 C.F.R. Part 171 (now Part 211 (1982)). Kerr-McGee argues that the regulatory scheme is so pervasive that it preempts all power on the part of the Tribe to deal with mineral leases, including the power to tax. It notes that the regulations allow for a lone exception: 25 C.F.R. § 171.29 provides that the provisions of the regulations "may be superseded by the provisions of any tribal constitution, bylaw, or charter issued pursuant to the Indian Reorganization Act." The Navajo Tribe has elected not to organize under the Indian Reorganization Act ("IRA") and has not adopted a constitution. Kerr-McGee argues that the provisions of the regulation thus operate to preempt any power to tax the Kerr-McGee mineral leaseholds.

We reject this argument for several reasons. First, Kerr-McGee misinterprets the purpose of the 1938 Act. Its purpose was not to generate distinctions between tribes organized under the IRA and tribes not so organized, but rather was to "bring all mineral leasing matters in harmony with the Indian Reorganization Act." S. Rep. No. 985, 75th Cong., 1st Sess., at 3 (1937); H.R. Rep. No. 1872, 75th Cong., 3rd Sess., at 3 (1938). At the time the 1938 Act was proposed, there was no statutory authority to lease lands on Indian Reservations created by executive order for mineral development (except oil and gas) in many states, unless a tribe had organized pursuant to Section 17 of the IRA, 25 U.S.C. § 477. See S. Rep. No. 985, *supra*, at 1-2. Tribes organized under Section 17 were empowered to lease their lands for periods of not more than ten years. *Id.* The purpose of

the 1938 Act was to abolish these distinctions by enabling all tribes to lease for mineral development. See S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, *supra* at 1.

Second, we note that there is nothing in the Mineral Leasing Act which inhibits the Tribe's inherent ability to tax as an essential attribute of sovereignty. In fact, nothing in the Act or its corresponding regulations mentions tribal taxation.³ Bearing in mind the Supreme Court's admonition to "tread lightly in the absence of clear indications of legislative intent [with respect to federal divestiture of Indian taxing power]," 455 U.S. at 149, quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978), we conclude that the power to tax was not preempted by the Mineral Leasing Act.

IV. Breach of Contract—

In Count IV of its amended complaint Kerr-McGee asserts that imposition of the taxes on it constitutes a unilateral modification of its lease and a breach of an implied contract that the royalties there specified were to constitute the only monetary compensation. The Supreme Court, in *Merrion*, *supra*, has disposed of this contention. The Court there held that the payment of royalties under a lease does not exempt the lessee from payment of taxes. "The royalty payments from the mineral leases are paid to the Tribe in its role as partner in petitioners' commercial venture. The severance tax, in contrast, is petitioners' contribution 'to the general cost of providing governmental services.'" 455 U.S. at 138, quoting *Commonwealth Edison v. Montana*, 453 U.S. 609, 623 (1981). We are unable to find, therefore, any breach of contract on behalf of the Tribe.

V. Commerce Clause—

In Counts V, VI, VII and VIII, Kerr-McGee asserts that imposition of the taxes violates the Commerce Clause of the

³ On the contrary, the legislative history suggests that an important purpose of the Mineral Leasing Act was to secure for the Indians "the greatest return from their property." S. Rep. No. 985, 75th Cong., 1st Sess. at 2; H.R. Rep. No. 1872, 75th Cong., 3d Sess. at 2.

United States Constitution because the Business Activities Tax impairs the privilege of engaging in interstate commerce and imposes multiple taxation without apportionment and because both taxes discriminate against interstate commerce.

The Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution, empowers Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The extent to which the negative implications of the Interstate Commerce Clause, in striking down state laws for creating burdens on interstate commerce, should be applied to tribal laws under the Indian Commerce Clause, has never been authoritatively determined. In *Merrion, supra*, the Supreme Court acknowledged that the Commerce Clause has been used by the Court "as a shield to protect Indian tribes from state and local interference". 455 U.S. at 153-54. It declined to decide whether the clause could be used to strike down the tax before the Court, holding that the tax did, in any event, pass the tests established for judging burdens imposed on commerce between the states. *Id.* 154, 156-158. We adopt the same course.⁴

Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977), held that a tax survives an Interstate Commerce Clause challenge if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

⁴ The Court in *Merrion* did take note of the fact that the Jicarilla Tribe had adopted a constitution pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, and had secured the approval of the Secretary of the Interior to the constitution and to the tax. 455 U.S. at 155. This was cited to establish the fact that Congress had provided steps by which approval of a tax could be secured and that such affirmative Congressional action eliminated the need for judicial scrutiny of the tax under the Commerce Clause. The Court further held, however, "The tax challenged here would survive judicial scrutiny under the Interstate Commerce Clause even if such scrutiny were necessary." *Id.* at 156. It is the Court's rationale at this point that we follow here.

The first two requirements are met here since the mining activities taxed occur entirely on reservation land. *Merrion, supra*, 455 U.S. at 157. The Possessory Interest Tax applies only to leases on lands under tribal jurisdiction. The Business Activities Tax is apportioned to fall only on activity occurring on lands under tribal jurisdiction. The value taxed is the value of the goods within the reservation or at the time the goods are transported outside of the reservation. The law thus escapes any multiple taxation problem by limiting its application to on-reservation value.

Under the third requirement, the question is whether the taxes discriminate in favor of local commerce by providing an advantage not enjoyed by interstate commerce. Kerr-McGee asserts that this is the case. It points to certain exemptions in the Business Activities Tax enjoyed by "traditional activities of Indians" and points out that few, if any, Indians would own leaseholds of a value making them subject to the Possessory Interest Tax. The Commerce Clause, however, looks not to ethnicity—Indian against non-Indian—but to competitive advantage in favor of local commerce. No such advantage is provided here.

As with the tax considered in *Merrion*, the Navajo taxes do "not treat minerals transported away from the reservation differently than [they treat] minerals that might be sold on the reservation." 455 U.S. at 157-58. There is, of course, nothing in the Commerce Clause which requires that all activities bear an equivalent tax burden. It is sufficient that there be no competitive disadvantage imposed for oil and gas sold on the reservation compared with oil and gas sold off the reservation.⁵

⁵ Kerr-McGee also alleges that the Possessory Interest Tax discriminates because it excludes the activities and possessory interests of the Tribe. It is true that the Navajo taxes do exempt tribal governmental subdivisions. Yet *Merrion* upheld an analogous exemption in the Jicarilla tax, finding that such an exemption merely avoided "administrative make-work" and was not "a discriminatory preference for local commerce." 455 U.S. at 158. We are similarly persuaded.

As to the fourth prong, Kerr-McGee asserts that the Business Activities Tax is not related in any way to any benefits provided to it by the Tribe; that there is no relationship between the tax imposed and the benefits received. At least, it argues, it should have a right to establish a factual record as to the extent of benefits received and the relationship that that figure bears to the tax imposed.

In *Commonwealth Edison Co. v. Montana*, *supra*, 453 U.S. 609 (1981), the Supreme Court dealt with the questions presented by the fourth prong. It stated:

The relevant inquiry ... is not ... the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. ... Beyond that threshold requirement, the fourth prong ... imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact

453 U.S. at 625-26.

In *Commonwealth Edison*, the tax was a severance tax measured by a percentage of the value of coal taken. This was held to be "in proper proportion" to the activities within the state. "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Id.* at 627. Accordingly, we find that the Business Activities Tax is sufficiently related to benefits provided to Kerr-McGee by the Tribe so as to survive a Commerce Clause challenge.

In that case *Commonwealth Edison* contended, as does Kerr-McGee, that factual inquiry should be had into the relationship between revenues generated by a tax and costs incurred on account of the taxed activity in order to assure that taxes are not excessive. The Court rejected this conten-

tion, stating: "The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." *Id.* at 627. It stated further: "In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do." *Id.* at 628.

We conclude that all requirements of *Complete Auto Transit* have been met; that summary judgment in favor of the Tribe on all challenged counts should be affirmed.

NAVAJO TRIBE APPEAL

The District Court held both the Possessory Interest Tax and the Business Activities Tax invalid for the reason that approval of those taxes by the Secretary of the Interior had not been obtained. The Court took note of the fact that a tribe that had organized under the Indian Reorganization Act, 25 U.S.C. § 461, *et. seq.*, or the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 *et. seq.*, would have to secure the Secretary's approval of its taxes. It noted that the Navajo Tribe had chosen not to organize under the IRA and had never adopted a constitution. It reasoned that the IRA manifested a Congressional policy in favor of organization of the tribes under constitutions approved by the Secretary; that a Congressional requirement of the Secretary's approval by an unorganized tribe such as the Navajo could be inferred because otherwise unorganized tribes could exercise greater power than those tribes that had acted in accordance with Congressional policy. It concluded: "[T]his court concludes that since Secretary approval is required for tax resolutions adopted pursuant to a tribal constitution surely Secretary approval must also be required for tax resolutions passed without a tribal constitution."

In this respect the District Court followed the holding of the District Court for the District of Utah in *Southland Royalty Co. v. Navajo Tribe of Indians*, *supra*. As we have

noted, the Tenth Circuit has reversed the Utah Court in that respect. It held:

We do not agree that there is support for this requirement [of Secretarial approval] in the statutes. The purpose of the IRA was to enable and encourage Indian self-government. Organization under the IRA was not the only form of self-government acceptable to Congress. One of the ways in which the IRA reflects a respect for self-government was in the provision that makes adoption of a constitution optional. 25 U.S.C. § 476. The choice of government is in itself an act of self-government and consonant with Congressional policies. The self-sufficiency of the Navajo Tribe could be impaired by the imposition of a requirement of secretarial approval of its actions as to taxes.

Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486, 489 (10th Cir. 1983).

We agree with the reasoning of the Tenth Circuit. We note that there is nothing in the Indian Reorganization Act or Navajo-Hopi Rehabilitation Act that requires tribes to submit their ordinances or resolutions to the Secretary for approval. It is true that tribal constitutions and charters of incorporation adopted pursuant to the IRA must be approved by the Secretary; yet, even as to organized tribes, the IRA itself does not require that any specific legislation be submitted for secretarial approval. Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters.

On the appeal taken by Kerr-McGee, JUDGMENT AFFIRMED. On the appeal taken by the Navajo Tribe, JUDGMENT REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

NAVAJO TRIBE OF INDIANS,
et al.,

Defendants.

No.
Civ. 80-247
Phx. WPC

MEMORANDUM
AND ORDER

Plaintiff, Kerr-McGee Corporation, leased reservation land from the defendant, Navajo Tribe, for the purpose of conducting mineral operations. This action was originally brought on May 10, 1979, in the United States District Court for the District of New Mexico. The suit challenges the validity of the Business Activity Tax and the Possessory Interest Tax adopted by the Navajo Tribal Council in 1978.

Although these taxes are both long resolutions, plaintiff's complaint fairly summarizes their pertinent parts. The Possessory Interest Tax purports to require plaintiff: (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one half ($\frac{1}{2}$) due on February 15 and one-half ($\frac{1}{2}$) due on August 15 of each calendar year. The Tax applies to every leasehold interest on or under the reservation that has a value in excess of \$100,000 at a rate of not less than one percent (1%) nor greater than ten percent (10%), which rate is presently set at three percent (3%).

The Business Activity Tax, on the other hand, purports to require plaintiff: (1) to file declarations of tax due on

May 15, August 15, November 15 and February 15 of each calendar year, (2) to pay taxes purportedly due on the said dates, and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax was effective as of July 1, 1978, and applies to every sale, either within or without the reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%), which rate is presently set at five percent (5%).

Both the Business Activity Tax and the Possessory Interest Tax purport to empower the Navajo Tax Commission to impose a number of penalties in the event of noncompliance, including "permanent loss of all right to engage in productive activity" on or under the reservation. Neither tax resolution has been approved or disapproved by the Secretary of the Department of the Interior.

The New Mexico District Court transferred the portion of the complaint which related to plaintiff's Arizona operations to this Court. Thereafter, on October 2, 1980 plaintiff filed an amended complaint. The amended complaint alleges in ten counts that the taxes are invalid for the following reasons: (1) lack of inherent power to tax, (2) treaty limitations on tribal power, (3) federal preemption of the regulation of operations under oil, gas and mineral leases for reservation land, (4) breach of contract, (5) violation of the commerce clause: imposition on the privilege of engaging in interstate commerce, (6) violation of the commerce clause: discrimination against interstate commerce, (7) violation of the commerce clause: multiple taxation, (8) lack of due process and equal protection, (9) lack of approval by the Secretary of the Interior, and (10) failure of the Secretary to carry out his mandatory duty to ensure that the mineral leases are not breached by tribal regulations which he has not approved.

Meanwhile, on March 8, 1979, a suit virtually identical to this one was filed in the United States District Court for the

District of Utah. *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D. Utah, filed March 8, 1979). In *Southland*, various oil companies brought suit against the Navajo Tribe to contest the validity of the Business Activity Tax and the Possessory Interest Tax. The complaint was very similar to the one presented here. Various motions for summary judgment and dismissal were filed. The Court heard these motions after the Tenth Circuit's decision in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), but prior to the United States Supreme Court's decision in that case.

On August 27, 1980, the Utah District Court issued its judgment. The Court declared that the Business Activity Tax and the Possessory Interest Tax were unlawful, void, and of no effect, unless and until they were lawfully approved by the Secretary of the Interior of the United States. *Southland* (amended judgment Aug. 27, 1980). However, in its memorandum and order, the Utah Court also held that: (1) the Tribe had an inherent power to tax, (2) the taxes were not barred by treaty, (3) the Tribe's power to tax was not preempted by federal law, (4) the taxes did not breach the mineral leases, (5) the taxes in no way violated the commerce clause, and (6) the taxes did not infringe upon the individual rights of due process and equal protection. *Id.* (memorandum and order June 5, 1980).

Just after the *Southland* order was issued by the Utah District Court, the Navajo Tribe moved for summary judgment in this case on Counts I thru VIII of Kerr-McGee's complaint. However, on January 5, 1981, this Court stayed all proceedings pending the United States Supreme Court decision in *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982). On January 25, 1982 the Supreme Court rendered its decision in *Merrion*. The opinion upheld a severance tax imposed by the tribe on "any oil and natural gas severed, saved and removed from Tribal lands." *Id.* at 899, 913. Thereafter, on March 5, 1982, Kerr-McGee moved for summary judgment on Count IX of the complaint, claiming that the taxes are void for lack of Secretary approval. Both motions for

summary judgment are now before the Court. Plaintiff's motion will be considered first.

Plaintiff's Motion for Summary Judgment on Count IX

Plaintiff argues that (1) the Tribe should be collaterally estopped from contesting the necessity of Secretary approval because *Southland* was determinative of the issue, and (2) in any event, under the merits of Count IX, the taxes are void for lack of Secretary approval. Hence, this Court must initially determine whether the doctrine of collateral estoppel is applicable. Since this action arises under the laws of the United States, federal law will be applied, rather than state law. See, *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 325 (1971).

Generally, collateral estoppel is appropriate where:

- (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir. 1979). In other words, the doctrine forecloses litigation of "issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment between the parties, whether on the same or a different claim." *Segal v. American Telephone and Telegraph Co.*, 606 F.2d 842, 845 (9th Cir. 1979).

In this case, collateral estoppel is appropriate. First, the issue presented here is identical to the one presented in *Southland*. The exact same tax resolutions of the Navajo Tribe were contested. Second, there was a final judgment on the merits in *Southland*. Moreover, the conclusion that the taxes were void due to a lack of Secretary approval was determinative of the suit. Third, the party against whom the plea is asserted was a party to the prior adjudication. The defendant, Navajo Tribe, also defended the suit in *South-*

land. Fourth, the Tribe was given a full and fair opportunity to be heard on the adjudicated issue.

The requirement that the estopped party be given a full and fair opportunity to litigate the issue is a heavy factor in determining whether the doctrine should be applied. If the estopped party could not foresee subsequent suits on the issue, or had no incentive to vigorously litigate the prior suit, he may not have been given a full and fair opportunity to litigate the adjudicated issue. See, *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979). Thus, the defendant, Tribe, "must be permitted to demonstrate, if [it] can, that [it] did not have 'a fair opportunity procedurally, substantively and evidentially to pursue [its] claim the first time.'" *Blonder-Tongue* 402 U.S. at 333, quoting *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298, 301 (D. Mass. 1960).

The Navajo Tribe has not shown that it was denied a full and fair opportunity to litigate the issue of Secretary approval in *Southland*. Subsequent suits challenging the taxes were clearly foreseeable. In fact, the Tribe was aware that suits were pending in New Mexico and Arizona. Thus, the Tribe had every incentive to litigate the Utah case fully and vigorously. Moreover, it is evident from the record in *Southland* that the Tribe did in fact vigorously contest the allegation that the taxes were void due to lack of Secretary approval.

In its brief, the Tribe asserts five arguments why collateral estoppel should not be applied in this case. However, all five of the arguments must fail.

First, the Tribe argues that the doctrine is inapplicable because Kerr-McGee was not a party to the first suit, and thus could not be bound by it. This argument is a restatement of the common law rule of "mutuality". However, the binding rule of "mutuality" has been abandoned by the United States Supreme Court. *Blonder-Tongue*, 402 U.S. at 324, 350; 1B *Moore's Federal Practice*, ¶0.412[1] at 1806 n.12 (2d ed. Supp. 1982). Consequently, the rule no longer limits this Court in the application of collateral estoppel.

Second, the Tribe argues that collateral estoppel is inapplicable because Kerr-McGee is attempting to use the doctrine "offensively". Offensive use of collateral estoppel occurs

when a plaintiff seeks to estop a defendant from relitigating an issue which the defendant previously litigated and lost against another plaintiff. *Parkland Hosiery*, 439 U.S. at 329. Although there are many persuasive arguments which may be advanced as to why collateral estoppel should not be used "offensively", the Supreme Court recently concluded that:

the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id. at 331.

In this case, there is no reason why collateral estoppel should not be applied, even if it is used "offensively". Kerr-McGee could not have easily joined in the *Southland* action. The company has no mineral operations on Navajo lands in Utah. In fact, the New Mexico District Court, in which Kerr-McGee originally filed its complaint, refused to hear claims with respect to the company's operations in Arizona. Instead, it transferred that portion of the case to this Court. In short, this is not a case where the party seeking to apply collateral estoppel has been "lying and waiting" for the result in the first suit. Furthermore, for the reasons previously stated, the application of collateral estoppel will not be "unfair" to defendant. The Tribe had a "full and fair opportunity" to litigate its claims. Moreover, the judgement in *Southland* is not inconsistent with any previous decisions.

Third, the Tribe argues that collateral estoppel is inapplicable because the issue of Secretary approval is a legal, not a factual, issue. It is true that collateral estoppel "has never been applied to issues of law with the same rigor as to issues of fact." *Segal*, 606 F.2d at 845. Thus, "when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate." *Montana v. United States*, 440 U.S. 147, 162 (1979). Nevertheless, the doctrine

of collateral estoppel is often applied to issues of law. *See id.* at 150-51; 1B *Moore's Federal Practice* ¶10.448 at 4234 (2d ed. 1982).¹

In this case, even though an issue of law is involved, collateral estoppel is particularly applicable. The present action does not involve subject matter unrelated to the prior action. In fact, the subject matter is identical. This case and *Southland* both involve the same Navajo tax resolutions. Moreover, both cases challenge the tax resolutions for the same reasons. A litigant is not entitled to more than one full and fair opportunity for judicial resolution of the same identical issue, whether it be one of law or fact.

Fourth, the Tribe argues that collateral estoppel is inapplicable because the United States Supreme Court decision in *Merrion* was handed down after *Southland*. Clearly, the doctrine of collateral estoppel should not be imposed if there has been a change of law or controlling legal principles have changed significantly since a previous judgment. *See, Montana*, 440 U.S. at 155; *Segal*, 606 F.2d at 845. However, there is no reason why collateral estoppel should not be imposed in this case.

¹ In *Montana v. United States*, 440 U.S. 147 (1979), the plaintiff, contractor, financed and directed by the United States, attacked the constitutionality of a Montana tax in the state court system. The Montana Supreme Court upheld the tax. *Id.* at 150, 151. Plaintiff subsequently abandoned his request for review by the United States Supreme Court. *Id.* at 151. Instead, the federal government went ahead with its suit in United States District Court challenging the constitutionality of the state tax. *Id.* The District Court held that it was not bound by the state court decision and it struck down the tax as violative of the Supremacy Clause. *Id.* at 151-52.

The United States Supreme Court held that the government, having lost in state court, was collaterally estopped from challenging the tax in federal court. *Id.* at 164. Thus, the doctrine was applied despite the fact that an issue of law was involved, i.e., the validity of the tax. This is very similar to the situation presented here. The Tribe, having had a full and fair opportunity to litigate the validity of its tax, is estopped from seeking a contrary resolution of that issue here.

The United States Supreme Court decision in *Merrion* did not "significantly change" the law. It merely affirmed the Tenth Circuit's decision which the District Court of Utah relied upon in *Southland*. Moreover, the *Merrion* decision only indirectly dealt with the issue of Secretary approval. The issue was in no way determinative or necessary to the result. Furthermore, the opinion's indirect treatment of that issue supports the result reached in *Southland*.² Therefore, there is no change of law which precludes the application of collateral estoppel. If the Tribe wishes to argue that *Merrion* mandates a reversal of the result reached in *Southland*, it is free to do so on its appeal of the *Southland* decision to the Tenth Circuit.

Fifth, the Tribe argues that the unique circumstances of tax litigation have exempted such actions from the doctrine of collateral estoppel. It is generally true that "a tax dispute which has been litigated and pursued to judgment is res judicata only as to subsequent proceedings involving 'the same tax year' as the previous litigation." *Texaco Inc. v. United States* 579 F.2d 614, 616 (Ct.Cl. 1978), quoting *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Before a party can invoke the doctrine of collateral estoppel for the different tax year, "the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." *Sunnen*, 333 U.S. at 601-02. Accordingly, the Tribe argues that the doctrine cannot be invoked here because Kerr-McGee's leases are different from the leases at issue in *Southland*.

However, the leases have no bearing whatsoever on whether Secretary approval is necessary for the challenged taxes to become effective. Although, as the Tribe states, a taxpayer cannot estop the United States from litigating the

² The merits of Count IX, i.e., whether the Navajo tax resolutions must in fact be approved by the Secretary, and what effect the *Merrion* decision has on that issue, is discussed in a later section of this memorandum and order.

application of tax statutes to particular taxable events in a subsequent year, this case does not deal with the application of taxes to a certain event. Rather, plaintiff challenges the validity of the taxes themselves. The doctrine of collateral estoppel can clearly be invoked to preclude a party from challenging the validity of a tax, which it had previously challenged, and lost. See, *Montana*, 440 U.S. at 150, 164. Thus, the Tribe can properly be estopped from relitigating the validity of the taxes themselves.

Moreover, this result is consistent with the policy behind the doctrine of collateral estoppel. One of the major purposes of the doctrine is to foster "reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54. If the doctrine is not applied in the present case, inconsistent decisions could easily arise on an identical issue: the validity of the Navajo tax resolutions. If inconsistent decisions were rendered, the same identical tax would be enforceable on one portion of the reservation, but unenforceable on another portion of the reservation. This result should be avoided.

Accordingly, for the reasons previously stated, this Court holds that the Tribe is collaterally estopped from relitigating the issue of whether the taxes are invalid for lack of Secretary approval. The Tribe has already had a full and fair opportunity to litigate that precise issue. The proper place for further litigation of that issue is on the appeal of *Southland* to the Tenth Circuit.

However, even assuming the Tribe is not collaterally estopped, Kerr-McGee is entitled to judgment as a matter of law on the merits of Count IX. The *Southland* decision is current, valid authority which is entitled to weight under the rule of stare decisis. Thus, in accordance with the following discussion, the result reached is identical.

The substantive issue of Count IX is whether the Navajo tax resolutions are void and of no effect because they lack Secretary approval. The Tribe clearly has the inherent, sovereign power to tax the mining activities of Kerr-McGee.

See, *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 905 (1982). However, the issue here is whether Secretary approval is necessary to "exercise" that power.

Out of proper respect for both tribal sovereignty and the plenary authority of Congress, courts must tread lightly in this area in the absence of clear indications of legislative intent. *Id.* at 908. The Tribe argues that since Congress has not "expressly" deprived it of its inherent, sovereign power to tax, it retains this power, regardless of Secretary approval. The District Court of Utah was faced with all these arguments when it rendered its decision in *Southland*. It concluded that although there was no statutory authority which "expressly" required that the Secretary approve the Navajo tax resolutions, such approval was required for a number of reasons. *Southland*, slip op. at 15-16 (order of June 5, 1980). This Court agrees.

In 1934, Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.* This Act authorized any tribe residing on a reservation to "organize" by adopting its own constitution and bylaws. *Id.* at § 476. The Navajo Tribe chose not to organize under this Act. Sixteen years later, Congress enacted the Navajo-Hopi Rehabilitation Act (NHRA), 25 U.S.C. § 631 *et seq.* This Act specifically offered the Navajo Tribe the opportunity to "organize" by a constitution. *Id.* at § 636. Once again, however, the Navajo Tribe chose not to do so.

If the Navajo Tribe had "organized" itself by adopting its own constitution pursuant to either Act, clearly it would have been required to obtain Secretary approval before it could impose the taxes at issue. See, 25 U.S.C. § 476; 25

U.S.C. § 636.³ Under these Acts, "a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers." *Merrion* 102 S.Ct. at 911. Consequently, this Court must determine whether the Navajo Tribe is also required to obtain the approval of the Secretary, even though it chose not to "organize" under either Act.

The Navajo Tribe contends that since it never adopted a constitution, both Acts are inapplicable and thus the approval of the Secretary is not required. However, this Court concludes that since Secretary approval is required for tax resolutions adopted pursuant to a tribal constitution, surely Secretary approval must also be required for tax resolutions passed without a tribal constitution. See, *Southland*, slip op. at 14 (order of June 5, 1980).

Although Congress never intended to require a tribal constitution, Congress certainly did intend to encourage the Navajos to adopt one. However there is no such encouragement if on the one hand tribes adopting a constitution must have that constitution approved by the Secretary, but on the other hand tribes without a constitution may govern solely by tribal resolution without need for Secretarial approval. In fact this state of affairs would encourage tribes *not* to adopt a tribal constitution, because to do so would be to place limits on tribal self-government that would not otherwise exist.

Id. The Indian Reorganization Act, and the Navajo-Hopi Rehabilitation Act were intended to grant more power to the

³ The Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, provides that tribal constitutions and bylaws must be "approved by the Secretary of the Interior." *Id.* at § 476. Moreover, "[a]mendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws." *Id.*

Likewise, the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 *et seq.*, provides that the Navajo Tribe has the right to adopt a tribal constitution which "shall become effective when approved by the Secretary." *Id.* at § 636. Amendments to the tribal constitution are also allowed with the specific approval of the Secretary. *Id.*

tribes, not to place limits on self-government that would not otherwise exist. Thus, Congress has implicitly required Secretary approval for tax resolutions adopted by a tribe without a constitution.

The Mineral Leasing Act of 1938 (MLA), 25 U.S.C. §§ 396a-g, requires that the Secretary approve all leases granted to non-Indians for oil, gas, or mining purposes. *Id.* at § 396b. The Tribe argues that since this Act only requires the approval of the Secretary to lease, such approval is not required to tax the lessors. In other words, there is no "clear indication" that Congress intended to limit the Tribe's taxing power by making it contingent upon Secretary approval. However, this argument must also fail.

Clearly, all operations under oil, gas or mineral leases are subject to the rules and regulations of the Secretary. 25 U.S.C. § 396d. However, one purpose of the MLA was to:

help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, *subject to the approval of the Secretary, where before the responsibility for such decisions was lodged in large part only with the Secretary.*

Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112 (9th Cir. 1981), *amended* 665 F.2d 1390 (1982) (emphasis added). Thus, under the terms of the MLA, if a tribe adopted a constitution pursuant to the Indian Reorganization Act, comprehensive authority over oil and gas leasing on the reservation would pass to the tribe. *Southland*, slip op. at 14 (order of June 5, 1980). "Without a tribal constitution, that comprehensive regulatory authority remains with the Secretary under 25 U.S.C. §§ 396a-g." *Id.* at 14-15. Therefore, since the approval of the Secretary is required even if the Tribe has adopted a constitution, and this authority has passed to the Tribe, such approval must also be required if the Tribe does not have a constitution and such authority remains with the Secretary.

Accordingly, it appears that Congress indeed "intended to require Secretarial approval of tribal tax resolutions, passed without [the] benefit of a tribal constitution, if such resolutions could have a significant effect on reservation oil and gas leases." *Id.* at 15. "Congress intended that the Secretary would examine these taxes to determine whether they are consistent or inconsistent with the federal regulatory framework." *Id.* Although there is no express statutory language requiring Secretary approval.

Congressional intent for such a requirement must be inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary, in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council.

Id. at 15-16.⁴

⁴ Both parties argue that *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982), substantiates their respective positions. However, the Jicarilla Apache Tribe in *Merrion* had adopted a constitution under the Indian Reorganization Act (IRA). Thus, *Merrion* did not directly concern the issue of whether the Secretary must approve tax resolutions passed by a tribe who has not adopted a constitution.

However, the opinion does include language which supports the result reached in this case. The Court stated that:

the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 903. The Court thus concluded that mandatory Secretarial approval would (i) minimize potential concern that tribes might exercise their taxing power in an unfair manner, and (ii) ensure that any exercise of the tribal taxing power would be consistent with national policies. These goals

Therefore, whether the Tribe is collaterally estopped to contest the issue of Secretarial approval or the Court considers the merits of the issue, the result is the same. The Navajo Business Activity Tax and the Possessory Interest Tax are void and of no effect, unless and until, they receive the lawful approval of the Secretary of the Interior of the United States. The Tribe has the inherent, sovereign power to tax, but the approval of the Secretary is the event necessary to "effectuate" these taxes. Thus, there are no genuine issues of material fact, and plaintiff, Kerr-McGee, is entitled to summary judgment for the allegations in Count IX of its amended complaint.

The Tribe argues that a summary judgment for plaintiff on Count IX would be improper because the United States is

are desirable whether or not the tribe has adopted a constitution. Moreover, the need to accomplish these goals may even be greater when the tribe has not adopted a constitution.

The *Merrion* opinion also stated that Congress had:

affirmatively acted by providing a series of federal check-points that must be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax non-members. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary. See Revised Constitution of the Jicarilla Tribe, Art. XI, §§ 1(e), 2. Cf. 25 U.S.C. §§ 476, 477

Id. at 911. The Court thus concluded that it was not its function, nor its prerogative, to strike down a tax that had travelled through the precise channels established by Congress, and had obtained the specific approval of the Secretary. *Id.*

Hence, although approval of the Secretary was required because the Tribe was "organized" under the IRA, and the Jicarilla tribal constitution itself required such approval, the Court clearly endorsed the use of, and deferred to, the process of Secretarial approval. Moreover, the language and authority used by the Court indicate that Secretarial approval should always be required in order to effectuate the process Congress intended to establish for the adoption of tribal tax resolutions, and to ensure that such taxes are both fair and consistent with national policies.

a "necessary" and "indispensable" party which the Court has no jurisdiction over. Plaintiff's amended complaint added Counts IX and X, and joined the Secretary of the Interior as a defendant. However, plaintiff never served the United States with process. As a result, the United States has not participated in this lawsuit. Consequently, the Tribe argues that in its absence, summary judgment should be denied, and the suit dismissed as to all parties on Counts IX and X. However, this Court concludes that the United States is not a "necessary" or "indispensable" party for plaintiff's motion for summary judgment, since it only covers Count IX of the complaint.

Rule 19 of the Federal Rules of Civil Procedure is entitled "Joinder of Persons Needed for Just Adjudication". It describes when a person is *necessary* to a suit.

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed. R. Civ. P. 19(a). If a person is "necessary", but cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person

being thus regarded as *indispensable*. Fed. R. Civ. P. 19(b) (emphasis added.)⁵

The United States is not "necessary" to this motion. Plaintiff has only motioned this Court for summary judgment on Count IX of its complaint, not Count X. Count IX alleges that the tribal tax resolutions are invalid until approved by the Secretary. Count X alleges that the Secretary has a mandatory duty to ensure that mineral leases are not breached by tribal tax resolutions which lack his approval.

The Secretary was made a defendant because a portion of the relief requested in the complaint seeks specific declaratory and injunctive relief against the Secretary, to require him to restrain the Tribe from enforcing the taxes. However, this portion of the relief requested only pertains to the allegations of Count X.

Count IX, on the other hand, neither seeks relief from the Secretary nor seeks to impose any duties on the Secretary. The only relief requested in the complaint applicable to Count IX requests that the taxes be declared null, void, invalid and unenforceable against plaintiff. In granting plaintiff's motion for summary judgment on Count IX, this Court only grants that relief. The taxes are declared to be null, void, invalid and unenforceable against plaintiff unless and until Secretarial approval is obtained. This judgment does not bind the United States and it does not affirmatively order the Secretary to do anything. In fact, the United States has no substantial interest in the validity of these taxes.

⁵ The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
Fed. R. Civ. P. 19(b).

Consequently, complete relief for Count IX can be accorded among those already parties, and the United States is not so situated that disposition of the action in its absence would impair its ability to protect its interest or leave any person already a party subject to substantial risk. Therefore, the United States is not a "necessary" party for Count IX of the complaint. Fed. R. Civ. P. 19(a).⁶ The summary judgment for plaintiff on Count IX is thus proper, even though the United States has not been joined as a party.

Defendant's Motion for Summary Judgment on Counts I thru VIII

Initially, the defendant, Tribe, argues that if it is estopped to contest Count IX because of the *Southland* decision, then plaintiff, Kerr-McGee, should be estopped to contest Counts I thru VIII since they were likewise decided by *Southland*. However, litigants who have never appeared in a prior action may not be collaterally estopped without litigating the issue. *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). If persons have never had a chance to present their arguments on a claim, "[d]ue process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Id.* Accordingly, because Kerr-McGee was not a party to the prior suit, it cannot be estopped from bringing the claims in Counts I thru VIII of the complaint.

Defendant has motioned this Court for summary judgment on each of the claims contained in Counts I thru VIII. Plaintiff concedes in its reply that the recent Supreme Court decision in *Merrion* requires a dismissal of Count I. Clearly, the Tribe has the inherent sovereign power to tax non-Indians. Plaintiff also concedes that *Merrion* requires a dismissal of the breach of contract claim asserted in Count IV. Thus, the only claims left on the motion for summary judgment

⁶ Moreover, even assuming the United States is a "necessary" party, it is clearly not an "indispensable" party under Rule 19. Fed. R. Civ. P. 19(b).

ment are the ones contained in Counts II, III, V, VI, VII and VIII. For the following reasons, defendant is entitled to summary judgment on all six of these claims. However, since each of the claims is distinct, each will be discussed separately.

COUNT II

Kerr-McGee alleges in Count II that the Treaty of June 1, 1868, 15 Stat. 667, entered into between the United States and the Navajo tribe, prohibits the Tribe from imposing the taxes at issue. However, nothing in the Navajo Treaty of 1868 bars the tribal taxes. *Southland*, slip op. at 6 (order of June 5, 1980). Neither tribal consent to "works of utility or necessity" on the reservation, nor any other language in the Treaty, specifically precludes the imposition of these taxes. *Id.*

COUNT III

Plaintiff alleges in Count III that the Mineral Leasing Act (MLA), 25 U.S.C. §§ 396a-g, preempts the Navajo Tribe from taxing oil and gas lessees, such as Kerr-McGee. The MLA establishes an extensive regulatory procedure for the leasing of oil and gas interests on tribal lands. The authority for such leases is delegated to the Secretary. *Id.* at § 396d. However, if a Tribe "organizes" under the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*, much of the authority over the leases passes to the Tribe. *Southland*, slip op. at 14 (order of June 5, 1980). See, *Merrion* 102 S.Ct. at 908, citing 25 U.S.C. § 396b. Accordingly, Kerr-McGee argues that since the Navajo Tribe has not adopted a constitution under the IRA, the regulatory authority remains with the Secretary, rather than passing to the Tribe, thus preempting the Tribe from imposing the challenged taxes.

However, the absence of a tribal constitution does not deprive the Navajos of their power to tax. The inherent tribal power to tax recognized in *Merrion* predates the IRA. *Southland*, slip op. at 7 (order of June 5, 1980). Therefore, this power exists regardless of the tribe's organization. Moreover, as previously discussed in this order, the MLA

implicitly requires that tribal taxes be approved by the Secretary, even if the Tribe is not "organized" under the IRA. Thus, although the MLA may require Secretarial approval, it does not preempt the Tribe's power to tax its lessee's mineral operations.

COUNTS V thru VII

Plaintiff alleges in Counts V thru VII that the challenged taxes violate the commerce clause by (1) taxing the privilege of engaging in interstate commerce, (2) discriminating against interstate commerce, and (3) imposing multiple taxation, without allocation.

This Court recognizes that any review of tribal action under the Interstate Commerce Clause is not without conceptual difficulties. *Merrion*, 102 S.Ct. at 909-10. However, even assuming that the taxes are subject to the Interstate Commerce Clause, there is no violation.

Courts only review state actions under the Commerce Clause when Congress has not acted or purported to act. *Id.* at 910.

Judicial review of state taxes under the Interstate Commerce Clause is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States. . . .

Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

Id.

In *Merrion*, the Court held that Congress had affirmatively acted by providing a series of federal check points which had to be cleared before tribal taxes could take effect.

Id. at 911. Under the IRA, tribes were required to obtain Secretarial approval before they could adopt or revise their constitution to tax non-members. *Id.* Further, before the tax ordinances could take effect, the tribes were required to again obtain the approval of the Secretary. *Id.*

The tribal tax at issue in *Merrion* had been enacted in accordance with that scheme. *Id.* Both the tribal constitution and the tax ordinance had been approved by the Secretary. *Id.* Therefore, the "administrative process established by Congress to monitor such exercises of tribal authority" had been fulfilled. *Id.*

As a result, the Court concluded that the tribal tax had come to them in a:

posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

Id. Consequently, the Court held that it was not its prerogative to strike down a tax that had traveled through the precise channels established by Congress, and had obtained the specific approval of the Secretary. *Id.* Thus, scrutiny under the Commerce Clause was unnecessary.

Likewise here, this Court has held that the Secretary must approve of the Navajo taxes even though the Tribe is not "organized" under the IRA. Although there is no statute expressly requiring Secretary approval for tribes not "organized" under the IRA, such approval was inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council. Thus, like *Merrion*, this Court concluded that Congress had affirmatively acted by requiring that the Navajo tax resolutions be approved by the Secretary.

Secretary approval fulfills the administrative process established by Congress to monitor such exercises of tribal authority. The taxes will have no effect until they receive specific federal approval. Therefore, unlike an unapproved state tax, judicial review is not needed to ensure that the taxes will not unduly burden or discriminate against interstate commerce. Since Congress has acted, this Court is not free to review the tribal taxes under the dormant Commerce Clause.⁷

COUNT VIII

Count VIII of the complaint alleges that the Navajo taxes effect a taking of plaintiff's property without just compensation and deny plaintiff equal protection, in violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*, and the Fifth Amendment of the Constitution of the United States. However, neither claim may be brought in this court.

An Indian tribe is not a federal instrumentality. It is a separate sovereign, pre-existing the Constitution. The tribe is therefore unconstrained by constitutional provisions framed specifically as limitations on federal or state authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Thus, the Navajo Tribe is not within the reach of the Fifth Amendment. *See id.*; *Trans-Canada Enterprises v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980); *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

Furthermore, this Court has no jurisdiction to hear a suit brought under the ICRA. The Supreme Court clearly held in *Santa Clara* that federal courts do not have jurisdiction to hear claims brought under § 1302 of the ICRA. 436 U.S. at 72. *See, Trans-Canada*, 634 F.2d at 476; *Barnes v. White*, 494 F. Supp. 194, 196-98 (N.D.N.Y. 1980); *Shubert Construction Co. v. Seminole Tribal Housing Authority*, 490 F.

⁷ The Court offers no opinion on the merits of plaintiff's claims in Counts V thru VII. Congress has struck the balance it deems appropriate. Thus, the Court is no longer needed to prevent a possible burden on commerce. *See, Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 910 (1982).

Supp. 1008, 1009-10 (S.D. Fla. 1980). The sole remedy in federal court for an alleged violation of the ICRA is an application for habeas corpus relief under § 1303. *Santa Clara*, 436 U.S. at 70; *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278-79 (9th Cir. 1981); *Trans-Canada*, 634 F.2d at 476. This [sic], this Court has no jurisdiction to hear the claims brought by plaintiff in Count VIII, under either the Fifth Amendment or the Indian Civil Rights Act.⁸

⁸ Plaintiff argues that the Tenth Circuit case of *Dry Creek Lodge Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied 449 U.S. 1118 (1981), mandates a contrary result. In *Dry Creek* a non-Indian attempted to operate a business on land owned within the reservation. A dispute arose concerning an access road on the land. The non-Indian business operator sought a remedy with the tribal court, but the court refused to hear the case. The tribal judge indicated that he could not incur the displeasure of the tribal council, which had not given its consent to the suit. *Id.* at 684. Although the claim was under § 1302, the federal court held it had jurisdiction. *Id.* at 685. It concluded that the reasons for limiting federal jurisdiction under the ICRA disappear when (1) no other relief or remedy is available, (2) the issues are not related to internal tribal affairs, and (3) the issue concerns a non-Indian. *Id.* Accordingly, under this reasoning, Kerr-McGee contends that *Santa Clara* was only applicable to intra-tribal disputes. This would allow a non-Indian to bring suit under the ICRA in federal court.

However, the Court is compelled to reject this contention. The *Santa Clara* holding is very clear. Federal courts have no jurisdiction to hear any claim brought under § 1302 of the ICRA regardless of whether plaintiff is an Indian or a non-Indian. 436 U.S. at 72. Thus, this Court declines to follow the reasoning of *Dry Creek*. See, *R. J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933, 939-41 (D. Mont. 1981) (court declined to follow reasoning of *Dry Creek* in face of the clear broad holding in *Santa Clara*).

Furthermore, even if this Court followed the reasoning of *Dry Creek*, it would have no jurisdiction to hear Kerr-McGee's claim under § 1302 of the ICRA. Under the reasoning of *Dry Creek*, federal courts have jurisdiction over an action against an Indian tribe only if no tribal remedy exists. *Kenai Oil and Gas Inc. v. Department of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981). If there is a tribal remedy, then, under *Dry Creek*, this Court has no jurisdiction, even if the dispute is not intra-tribal. *Id.* In this case, Kerr-McGee has a tribal remedy. It is free to bring an action under the ICRA in Navajo Tribal Court.

Accordingly, for each of the reasons so stated, there are no genuine issues of material fact and the defendant, Navajo Tribe, is entitled to judgment as a matter of law for Counts I thru VIII of the complaint. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962); Fed. R. Civ. P. 56 (c).

IT IS ORDERED:

1. Plaintiff's motion for summary judgment on Count IX of the complaint is granted, in accordance with the above discussion.

2. Defendant's motion for summary judgment on Counts I thru VIII of the complaint is granted, in accordance with the above discussion.

DATED June 29, 1982.

/s/

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHLAND ROYALTY COMPANY,
PHILLIPS PETROLEUM COMPANY,
et al.;
THE SUPERIOR OIL COMPANY,
et al.;
TEXACO, INC., et al.,

vs.

THE NAVAJO TRIBE OF INDIANS,
et al.,

Defendants.

Case No.
C 79-0140
C 79-0153
C 79-0237
C 79-0296

MEMORANDUM
OPINION
and ORDER

These are consolidated actions filed by various oil company plaintiffs against defendants that include the Navajo Tribal Council, the Navajo Tax Commission, various tribal officers, and various state and federal agencies and officers. Plaintiffs assert interests in oil and gas leases located on the Navajo Indian Reservation in San Juan County, Utah and seek injunctive and declaratory relief against the enforcement of tribal taxes imposed on the leases. In the event the tribal taxes are upheld, plaintiffs seek similar relief prohibiting the enforcement of taxes imposed by the State of Utah and San Juan County relating to the same leases.

Numerous sources of federal subject matter jurisdiction are alleged, including 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity of citizenship), 28 U.S.C. § 1337 (actions affecting commerce), 28 U.S.C. § 1343 (Civil Rights), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. § 2201 (declaratory relief) and 5 U.S.C. § 704 (Administrative Procedure Act). Personal jurisdiction is alleged under Federal Rules of Civil

Procedure, Rule 4(e) and *Utah Code Annotated* § 78-27-24. Venue is alleged to be appropriate in this District and Division under 28 U.S.C. § 1391.

The tribal taxes under attack are CJA-13-78 which imposes an annual tax of 1% - 10% of the value of lease interests on the reservation and CAP-36-78 which taxes 4% - 8% of the gross receipts of certain business activities on the reservation. Both of these taxes are the subject of tribal resolutions enacted in 1978 and provide for monetary penalties, seizure of assets and banishment of business proprietors from the reservation, in the event of non-compliance.

Numerous claims have been asserted in the several complaints filed in these actions, including claims that:

1. The taxes exceed tribal authority because not authorized by Congress or because they are barred by the Tenth Amendment to the United States Constitution;
2. The taxes exceed tribal authority because not authorized by the Secretary of the Interior;
3. The Secretary of the Interior violated the Administrative Procedure Act by failing to review and disapprove the taxes, or by acting without proper administrative procedures;
4. The taxes violated provisions of the written oil leases, or the tribe is estopped by the leases;
5. Pursuant to 25 U.S.C. § 398c, only the State of Utah has the power to tax these leases;
6. The taxes violate the Treaty of 1868, and the penalties for non-payment are "quasi-criminal" and may not be imposed upon non-Indians;
7. The taxes deny Constitutional right to Due Process and Equal Protection of the Laws, and they violate the Civil Rights Act and the Indian Civil Rights Act (25 U.S.C. § 1302);
8. The taxes unlawfully impede Interstate Commerce and the power of Congress to regulate commerce with the Indian tribes;

9. Assuming the tribal taxes are legal, the state and local taxes are illegal, under a variety of theories.

In addition, the state and county defendants have filed counterclaims and cross-claims seeking a determination that their taxes are valid. In C 79-0296, which has proceeded somewhat differently than the other cases because only tribal officers and the Secretary of the Interior have been named as defendants, the state and county parties have filed a Complaint in Intervention seeking a similar determination.

On September 4, 1979 the court heard oral arguments on all motions then pending. All parties in these cases appeared through counsel, and all motions were fully briefed. The Navajo defendants withdrew their Motion seeking summary dismissal of certain plaintiffs' motions. The court granted Southland's Motion to Amend its Complaint in C 79-0140. The court took the rest of the motions under advisement, and now intends to rule upon them.

These motions are:

1. The federal defendants' Motions to Dismiss the Complaints in all of the cases, for failure to state a claim, on the grounds that there is no federal authority to approve or disapprove tribal taxing resolutions, and if such authority exists it is discretionary authority not subject to mandamus;
2. The federal defendants' Motions to Dismiss cross-claims filed in all cases except C 79-0296, and their Motion to Dismiss the Complaint in Intervention in C 79-0296, all on the grounds that no relief is sought against the federal government and that to the extent relief is sought no claim of mandamus can be stated against the federal government on the tribal taxing resolutions;
3. The Navajo defendants' Motions to Dismiss the Complaints in all cases, Motions to Dismiss cross-claims and Motion to Dismiss the Complaint in Intervention in C 79-0296. These defendants allege that the various pleadings fail to state a cause of action, that sovereign immunity of the tribe bars subject matter jurisdiction; that tribal offi-

cials are also protected by sovereign immunity because acting in their official capacities, that the court is without authority to review tribal laws, that if the court has authority it should abstain in favor of tribal courts, that insufficient facts have been pled to establish claims of breach of lease agreements and claims of interference with commerce, that the claims of lack of tribal authority to tax are contrary to law, that the court has no jurisdiction of claims under the Indian Civil Rights Act, and that the state and county defendants and intervenors lack standing. Also, because the Complaint in C 79-0296 does not name the tribe as a defendant, the Navajo defendants move to dismiss that Complaint on the ground that the tribe is an indispensable party who cannot be joined without defeating subject matter jurisdiction;

4. Motions to Compel Discovery against the Navajo defendants, filed by plaintiffs in C 79-0140 and C 79-0153. The Navajo defendants have resisted discovery, pending the outcome of their dispositive Motions to Dismiss.

As to the federal defendants' Motion to Dismiss the Complaint in Intervention in C 79-0296 and their Motions to Dismiss cross-claims in the other cases, to the extent no relief is requested by the state and county against the federal government these motions are moot and to the extent relief is requested these motions will be governed by the resolution of the federal defendants' Motion to Dismiss the Complaints.

As to the Navajo defendants' Motions to Dismiss the Complaint in Intervention and the cross-claims, the court finds the state and county parties have standing, if for no other reason than the alternative claims of the plaintiffs attacking the taxing authority of the state and county parties. Other grounds raised by the Navajo defendants will be governed by the outcome of the Navajo defendants' other dispositive motions.

Thus the key motions to be decided are those of the Navajo and federal defendants attacking the Complaints of the oil

company plaintiffs. Also, the state and county parties filed Motions to Dismiss based on 28 U.S.C. § 1341 and Motions for Summary Judgment based on 25 U.S.C. § 398c. At a hearing held on April 14, 1980, the court denied the Motions to Dismiss and took the Motions for Summary Judgment under advisement. The court now intends to rule on these Motions for Summary Judgment as well.

After some of the pending motions in these cases were taken under advisement, the Tenth Circuit Court of Appeals issued a decision in the consolidated cases *Merrion, et al. v. Jicarilla Apache Tribe, et al.*, No. 78-1154 (10th Cir. Feb. 22, 1980) and *Mobil Oil Corp., et al. v. Jicarilla Apache Tribe, et al.*, No. 78-1251 (10th Cir. Feb. 22, 1980). This Tenth Circuit decision (hereinafter referred to as *Merrion*) upheld a tribal severance tax imposed by the Jicarillas on reservation oil and gas leases. Because of the obvious impact of *Merrion* on the motions pending before this court, oral arguments based on *Merrion* were heard March 13, 1980 at the court's request. It is the court's opinion that *Merrion* controls most of the issues now before the court. Supplemental briefs addressing *Merrion* have been filed by the parties.

Navajo Defendants' Motions to Dismiss Complaints

In light of *Merrion* and other cases, the defense of sovereign immunity will protect the tribal governmental entities, which entities shall be dismissed from these actions, but not the tribal officers. The tribal entities may participate if they wish, but they are not indispensable parties whose dismissal or absence would require dismissal of the claims against the tribal officers. Also, there appears to be no good reason for the court to abstain in favor of tribal courts, where the issues remaining after *Merrion* primarily involve interpretation of federal law rather than tribal law. *Merrion* establishes that the court has authority to determine whether the tribal tax resolutions violate federal law.

Among the other grounds urged by the Navajos in support of dismissal is the contention that none of the various claims

pled by the plaintiffs state a cause of action upon which relief can be granted. As indicated above, rather than list each claim of each plaintiff, the court has categorized the claims. Each category will be discussed below in terms of what remains, if anything, after *Merrion*.

Claims that the power to tax is beyond the inherent, sovereign authority of the Navajo Tribe, and that the taxes in this case must fail for want of specific Congressional approval are claims that must be dismissed under *Merrion*. *Merrion* holds that the Indian tribes have all sovereign authority, including the authority to tax non-Indians operating within the reservations, except that authority specifically withdrawn by treaty or federal legislation or authority that is inconsistent with some dominant federal interest.

The court has read the Navajo Treaty of 1868, 15 Stat. 667, and finds nothing in that treaty that would bar the taxes at issue. *Merrion* indicates that a general ceding of tribal civil or criminal jurisdiction is not sufficient. (See Article I of Navajo Treaty). Neither tribal consent in Article IX to "works of utility or necessity" on the reservation, nor any other language in the Navajo treaty, precludes the taxes at issue, according to standards of treaty interpretation applied in *Merrion*. The court notes in passing that Article II of the Treaty appears to recognize the Navajos' right to exclude non-members from the reservation and that the Senate ratified the Treaty, as if dealing with a foreign sovereign. Claims based on the Treaty of 1868 must be dismissed.

Regarding Congressional withdrawal of the power to tax, *Merrion* disposed of the contention that 25 U.S.C. § 398c, which empowers the state to tax oil and gas leases on executive order reservations, withdrew taxing authority from the Indian tribes. Claims relying on § 398c must also be dismissed.

Plaintiffs in *Merrion* argued that in 25 U.S.C. §§ 396a-g Congress established a comprehensive regulatory scheme governing oil and gas leasing on the reservations, which is administered by the Secretary of the Interior, and that this

scheme precluded tribal taxation of oil and gas leases. The Tenth Circuit rejected that argument based on 25 U.S.C. § 396b, which transfers regulatory authority over oil and gas leasing to those tribes that have adopted a corporate charter and tribal constitution pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 476 and 477. Since the Jicarillas had adopted a charter and constitution, §§ 396a-g did not apply to them.

The Navajos have not adopted a charter and constitution, even though they were given still another opportunity to do so in 25 U.S.C. § 636. The absence of a tribal charter and constitution by itself would not deprive the Navajos of their power to tax, because the tribal sovereignty discussed in *Merrion* predates the Indian Reorganization Act, which Act merely recognized the incidents of sovereignty existing at the time it was passed. However plaintiffs here argue that because Congress enacted a comprehensive regulatory scheme, and because 25 U.S.C. § 396d gave the Secretary of the Interior regulatory authority over oil and gas operations on the reservations as part of that scheme, Congress intended that tribal resolutions impacting oil and gas operation required Secretarial approval, unless enacted pursuant to a tribal constitution.

A related argument is that because tribal constitutions adopted either under 25 U.S.C. § 477 or 25 U.S.C. § 636 require Secretarial approval, Congress intended that tribal resolutions passed without benefit of a tribal constitution also require Secretarial approval. Because these arguments regarding Secretarial approval are not directly controlled by *Merrion*, and because these arguments also related to the federal defendants' Motions to Dismiss, they will be discussed in more detail below.

Still a third argument regarding Secretarial approval is contained in plaintiffs' claims alleging that the tribal tax resolutions were, in effect, amendments to the written oil and gas leases and that because the Secretary had to approve the original oil and gas leases, he also had to approve the

amending resolutions. Lack of Secretarial approval was not an issue in *Merrion* because the Secretary had approved the Jicarilla resolution, based on a requirement in the Jicarilla Constitution. Claims against the Secretary based on that approval were abandoned at trial in *Merrion*. However *Merrion* did consider and reject contentions that the Jicarilla resolution violated oil and gas lease provisions barring unilateral changes in rentals or royalties. These lease provisions are virtually identical to lease provisions before this court. Plaintiffs here argue that the Navajo resolutions either are lease amendments requiring Secretarial approval, or are invalid because in conflict with and estopped by express lease terms.

The court feels that the Tenth Circuit rationale for finding no lease violations also applies to the lease violation claims here, to the claims that the Navajo resolutions amended the leases, and to the claims that the Navajos are estopped by the leases. The Tenth Circuit reasoned that the tribe acts as a property owner in agreeing to lease royalties and rentals, but it acts as a sovereign in establishing taxes on those same leases. Unless the tribe specifically agrees not to tax in the lease, and there was no such agreement either here or in *Merrion*, the tribe is not barred from imposing taxes paid in addition to lease rentals and royalties. If tribal taxes on oil and gas output and on lease interests are to be distinguished in this fashion from tribal royalty agreements on the same output and rental agreements on the same lease interests, the taxing resolutions cannot be construed as forfeiting or amending the royalty and rental agreements, and these agreements do not estop the exercise of the taxing authority. The Navajo resolutions, in contrast to the Jicarilla resolution, do not even specifically single out oil and gas leases, and on their face the Navajo resolutions apply to a much broader range of property interests than just interest in oil and gas leases. Thus, claims that the Navajo resolutions forfeit or violate the leases, claims that the resolutions amend the leases, and claims that the leases estop the taxes, all must be dismissed.

Plaintiffs also plead claims alleging that the tribal taxes are barred by the reservation of powers contained in the Tenth Amendment. Tenth Amendment considerations were not expressly considered in *Merrion*. Nevertheless the court feels that the general *Merrion* analysis requires dismissal of the Tenth Amendment claims as well. Tribal sovereignty does not spring from the United States Constitution, but rather predates it. Also the Constitution expressly gives Congress the exclusive authority to control relations with the Indian Tribes, which apparently includes authority to treat the tribes as self-governing entities, as opposed to following an assimilation policy. Otherwise, over 100 years of federal Indian law no longer applies.

Plaintiffs have filed claims alleging that the taxing resolutions violate rights to Due Process and Equal Protection under either the U. S. Constitution and Civil Rights Acts or the Indian Civil Rights Act, 25 U.S.C. § 1302. There are also claims that the Commerce Clause and Indian Commerce Clause are violated and that the penalties for non-payment of the taxes are "quasi-criminal". *Merrion* apparently was not confronted with the Indian Civil Rights Act, possibly because the Jicarilla Constitution expressly incorporated the United States Constitution. Also, the Jicarilla tax is somewhat different than the Navajo taxes. However the Tenth Circuit did examine several Constitutional questions in determining that there was no dominant federal interest subverted by the Jicarilla tax, and much of what *Merrion* had to say on these questions applies here, whether the claims are based on the U. S. Constitution and Civil Rights Acts or the Indian Civil Rights Acts.

In *Merrion*, the Tenth Circuit found that the only conceivable Due Process violation in the tribal taxing authority was if that authority masked the exercise of some different and forbidden power, such as the confiscation of property without just compensation. In *Merrion*, the trial court made a factual finding that some of the lessees could not afford to absorb the tribal taxes and would be forced to shut down oil and gas wells, resulting in an unjust transfer of the wells to

tribal control. The Tenth Circuit did not overturn this factual finding, but nevertheless it held that the Jicarilla tax was not confiscatory. As written, the Navajo taxes, including the penalties for non-payment, are no more confiscatory or "quasi-criminal" than the Jicarilla tax. Although plaintiffs here ask the court to foresee a confiscatory application of the taxes and the penalties for non-payment, this is speculative since the taxes have not been enforced yet, no taxes have been paid and no penalties imposed. At this point, the court can only interpret the tax resolutions on their face, and according to the *Merrion* analysis, they pass muster. The court does not believe that under *Merrion* the Navajos need to demonstrate any particular level of governmental services offered in return for the taxes, beyond existing tribal consent for plaintiffs to do business on the reservation.

As to Equal Protection, the Navajo resolutions on their face appear to apply to Indians as well as non-Indians, and tribal members as well as non-members. (See § 9 of the business activity tax and § 21 of the possessory interest tax.) Although the tribe itself is exempt, *Merrion* does not require that the tribe tax itself in order to avoid claims of discrimination. Again, plaintiffs argue that the effect of certain other exemptions, when applied together, will result in a discriminatory application. Again, the court cannot foresee at this point how the taxes will be applied. However the foregoing analysis indicates that, even assuming this court has jurisdiction over Indian Civil Rights Act claims, and even assuming plaintiffs have standing to bring those claims, plaintiffs have not pled a cause of action that would entitle them to relief under the Indian Civil Rights Act. Claims that the Navajo taxes violate Due Process or Equal Protection whether under the Constitution, Civil Rights Acts or Indian Civil Rights Act must be dismissed.

In analyzing the Commerce Clause, Article I, Section 8, Clause 3, *Merrion* held that the analysis applied to commerce "among the several states" also applies to commerce "with the Indian Tribes". The Commerce Clause does not ban tribal taxes impacting commerce. It does limit these

taxes so as to prevent discrimination against interstate commerce and to prevent multiple burdens on interstate commerce. The Jicarilla tax did not breach either of these limitations. The issue before this court is whether the differences between the Jicarilla tax and the Navajo taxes could lead to a different result here.

As to the Navajo possessory interest tax, it is clear that the tax does not violate either the Commerce Clause or Indian Commerce Clause, as those constitutional provisions are analyzed in *Merrion*. The tax is the equivalent of an ad valorem real property tax, but is imposed on leaseholds rather than freehold interests. As such, it is a tax even more "local" in character than the Jicarilla tax in *Merrion*. Again, the fact that the sovereign exempts itself from the tax does not make the tax discriminatory. Also, an ad valorem real property tax, like a severance tax, is not the type of tax that imposes "multiple burdens" on commerce, even though a double burden may be created if the state or county can impose a tax under 25 U.S.C. § 398c.

The business activity tax, which is a sales tax or gross receipts tax, is not as "local" in nature as either a severance tax or an ad valorem real property tax. Plaintiffs argue that they may be able to show through discovery that competing intra-state businesses exist on the reservation and are the beneficiaries of discrimination against plaintiffs' inter-state business, and that all of plaintiffs' goods and services subject to the tax are destined for immediate entry into commerce. They also argue that the tax is imposed at the point goods and services enter commerce and is therefore a tax on commerce rather than a tax on "local" activity such as mining.

However on its face, the tax ordinance does not discriminate between intra-state and inter-state commerce, because in § 3(b) it purports to tax sales "either within or without the Navajo Nation". The tax is directed at "local activities" (see the definition of "Navajo Goods" in § 3(c) of the tax ordinance) as well as inter-state activities, even though certain retail businesses and farming and livestock activities are ex-

empt. It is not the "privilege" of engaging in inter-state commerce that is taxed but the "privilege" of doing business on the reservation, whether that business is inter-state or intra-state.

Plaintiffs allege that under § 3(b)(i) of the ordinance, the tax is imposed as goods and services are transported off the reservation. However the sale of goods and services is taxed whether or not the goods and services are transported off the reservation. This section merely fixes a measure of the tax for those goods and services that are transported off the reservation. It is analagous to the Jicarilla provision imposing a tax on oil and gas 'sold or transported off the Reservation', which was upheld by *Merrion* and was interpreted to mean that the taxable event was severance, whether or not the oil and gas was sold on the reservation or transported elsewhere before sale. Here, the taxable event is a sale, whether or not the goods and services which are sold leave the reservation.

Thus, plaintiffs' claims that most or all of the oil and gas they produce are transported off the reservation are of no avail, since in *Merrion* the court found that even though 80% of the products which were taxed entered commerce, and even if this entry was immediate, and even if the cost of interstate commerce was increased, commerce was not discriminated against where the terms of the tax ordinance did not differentiate between intra-state and inter-state activities. The same rationale applies here, regardless of what plaintiffs' discovery might show. Also, as noted above, the business activities tax precludes discrimination against non-members of the tribe in § 9, and the exemption of the tribal sovereign from the tax is not discriminatory.

On the "multiple burden" question, this tax is not the type of tax that could be imposed by every state with equal right because the tax is tied to the source of the goods and services that are sold. That source is the Navajo Reservation, so that in a sense the tax is like a severance or other tax on "local activity". Thus claims that the Navajo taxes

breach the Commerce Clause or Indian Commerce Clause must be dismissed.

Federal Defendants' Motions to Dismiss

As indicated above, both the federal defendants and Navajo defendants argue that the Secretary of the Interior has no authority to review the Navajo taxes. The Secretary declined to review these taxes based upon that alleged lack of authority. If he does have authority, then exercise of that authority could be a pre-condition to the validity of the taxes.

Although plaintiffs cite several sources of statutory authority alleged to apply, the most persuasive arguments are that Secretarial approval is required, in the absence of a tribal constitution, because of federal pre-emption of regulatory authority over reservation oil and gas activities under 25 U.S.C. §§ 396a-g, or that because Secretarial approval of tribal constitutions is required under 25 U.S.C. § 477, and approval of the Navajo constitution in particular is required under 25 U.S.C. § 636, resolutions passed without a tribal constitution also require Secretarial approval.

In their supplemental briefs, plaintiff oil companies argue for the first time that the Navajo Tribal Council is not the governing authority of the Navajo Tribe. This argument is without merit. Although initially the Tribal Council was the creation of the Interior Department rather than the tribe, it is universally recognized as the existing, legally constituted governing body of the tribe, acting with all of the sovereignty of the tribe. Congress never intended, either in 25 U.S.C. §§ 476 and 477, or in 25 U.S.C. § 636, that enactment of a tribal constitution was a pre-condition to the Tribal Council's exercise of the tribe's sovereign authority. However the Council's status as the creation of the Interior Department does add more weight to the argument that Congress intended to require the approval of the Secretary of the Interior for these taxing resolutions, in the absence of a tribal constitution.

Although Congress never intended to require a tribal constitution, Congress certainly did intend to encourage the

Navajos to adopt one. However there is no such encouragement if on the one hand tribes adopting a constitution must have that constitution approved by the Secretary, but on the other hand tribes without a constitution may govern solely by tribal resolution without need for Secretarial approval. In fact this state of affairs would encourage tribes *not* to adopt a tribal constitution, because to do so would be to place limits on tribal self-government that would not otherwise exist.

Encouragement for a tribal constitution is provided by 25 U.S.C. § 396b. With a tribal constitution approved by the Secretary, comprehensive regulatory authority over oil and gas leasing on the reservation passes to the tribe. Without a tribal constitution, that comprehensive regulatory authority remains with the Secretary under 25 U.S.C. §§ 396a-g. It appears to the court that Congress intended to require Secretarial approval of tribal tax resolutions, passed without benefit of a tribal constitution, if such resolutions could have a significant effect on reservation oil and gas leases.

Although plaintiffs argue that in 25 U.S.C. §§ 396a-g Congress intended to pre-empt tribal taxes on oil and gas leasing, the court believes that Congress intended that the Secretary would examine these taxes to determine whether they are consistent or inconsistent with the federal regulatory framework. This intent was not fulfilled by the Secretary's pro forma determination that the tribal taxes were not "leases" or "royalties". Regardless of the label, the Secretary should have examined the tribal resolutions to determine their impact on the very regulatory system he is charged with administering.

The Secretary argues that if he has the authority to review these resolutions, he has a great deal of discretion in deciding whether to disapprove them. This may be true, but such discretion would not extend to the issue of whether to review at all, if Congress intended that he would exercise a review function upon proper application. The Secretary also argues that it is not his function to protect the oil companies. Again, this may be true. However if, as the plaintiffs

argue, these taxes will discourage or prevent outside development of reservation oil and gas resources, the Secretary may have a duty to determine whether these taxes are in the tribe's best interests, and whether they frustrate any dominant federal policy embodied in the existing regulatory authority over oil and gas leasing. Although the Secretary contends his duties here don't run to the plaintiffs, if the tribal taxes require his approval, he should remain in the lawsuit.

The court agrees with defendants that there is no express statutory language requiring Secretarial approval as a precondition to the validity of the Navajo tax resolutions. However the court finds that Congressional intent for such a requirement must be inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary, in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council. Thus, the federal defendants' Motions to Dismiss will be denied. Except as to those claims made against tribal officers that Secretarial approval of the Navajo tax resolutions was required as a precondition to their validity, the Navajo defendant's Motions to Dismiss will be granted. The Motions to Dismiss will be denied as to the claims alleging Secretarial approval was required.

Motions for Summary Judgment of San Juan County and the State of Utah

The state and county parties contend that 25 U.S.C. § 398c specifically authorizes their taxes at issue in this case. Plaintiffs argue that the subsequent legislation embodied in 25 U.S.C. §§ 396a-g by its terms repealed "inconsistent" statutes, including § 398c, and that leases issued after 1938 are exempt from § 398c. This subsequent legislation was otherwise silent as to state taxation of reservation oil and gas leases. From this silence, the Interior Department has inferred a Congressional intent not to permit state taxation;

which intent would render § 398c "inconsistent". Although this agency's interpretation is entitled to some weight, statutory construction is a question of law that is primarily for the court to determine.

Plaintiffs allege that their claims against the state and local taxes apply only if the Navajo taxes are upheld. However it appears to the court that the question of the validity of the state and local taxes is independent from the question of the validity of the Navajo taxes, and that unless § 398c has been repealed, the state and local taxes must be upheld. These are the types of taxes that have traditionally been held constitutional under both the Commerce Clause and the Due Process Clause. Although the state may be limited in its power to tax the tribe and tribal assets, the tax falls upon plaintiffs rather than on the Tribe. Even though a tax that creates a "double burden" may impose financial hardship, financial hardship is not a basis for setting aside a tax, and federal, state and local taxes regularly are imposed on the same or similar activity without running afoul of the "multiple burden" analysis discussed in *Merrion*.

The court cannot believe that Congress intended to repeal § 398c simply by the repeal of statutes "inconsistent" with §§ 396 a-g. This is boiler plate language used in many federal statutes and it seems just as likely that Congress intended to continue to permit state taxation within its regulatory framework as it does that Congress intended to proscribe state taxation. Since repeal of federal statutes by implication is not favored, and since § 398c was only eleven years old when §§ 396a-g were passed, the inference to be drawn from Congressional silence here is that Congress intended to preserve § 398c rather than to do away with it.

More importantly, there are no facial inconsistencies between § 398c and §§ 396a-g, and there is nothing in the legislative history to show that Congress thought state taxation would undermine federal or tribal regulation of reservation oil and gas leasing. The only alleged "inconsistency" that plaintiffs can identify is the speculation that

financial hardship on them will ultimately be detrimental to the Tribe as well. Although plaintiffs seek discovery to buttress this speculation, until the Navajo tax resolutions are applied, the court can only interpret them on their face. Discovery as to projected impacts of the taxes would not add anything, because these projections are speculative themselves, especially as they relate to the contention that plaintiffs will be driven from the reservation as the result of either non-payment of the taxes or the economic hardship caused by payment.

Also, the court has ruled above that Congress intended in §§ 396a-g that the Secretary would examine tribal resolutions affecting oil and gas leasing on the reservation, to determine whether they will cause adverse impacts on the tribe or frustration of a federal policy. The Secretary's determination would have to take into account the existence of state and local taxes, regardless of his opinion as to their legality.

Thus the court will grant the Motions for Summary Judgment of San Juan County and the State of Utah, and as a corollary will dissolve the prior Order permitting plaintiff Southland Royalty Company to deposit its state and local taxes with the court.

Motions to Compel — Need for Discovery

The only claims remaining in these actions are those alleging that the tribal tax resolutions are invalid for want of approval by the Secretary of the Interior. The court has determined as a matter of law that such approval is a precondition to validity. A final Order based on that determination must await dispositive motions requesting particular relief. As to the plaintiffs' claims that the court is dismissing, discovery was not necessary because the factual issues related to premature and speculative contentions about the future application and impact of the tax resolutions. Therefore further discovery would not be appropriate, and the pending Motions to Compel will be denied.

Finally, the parties have submitted and the court has considered affidavits and other documents beyond the pleadings

and legal memoranda. Thus the court is treating the Motions to Dismiss as Motions for Summary Judgment pursuant to Rule 12(b), Federal Rules of Civil Procedure. However any fact disputes raised were not deemed material to the interpretation of the Navajo tax resolutions as written, or to other legal issues determined by the court. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the court finds that as to those claims the court is dismissing, there is no just reason for delay in entering a final Judgment of Dismissal, and the court directs that such final Judgment be entered.

Therefore, in light of the foregoing, the court hereby Orders:

1. Except as to those claims made against tribal officers that approval by the Secretary of the Interior is a precondition to the validity of the Navajo tax resolutions, the Motions to Dismiss of the Navajo defendants are Granted. The Motions to Dismiss are denied as to the claims alleging Secretarial approval was required. To the extent these Motions to Dismiss are granted, the court directs that a final Judgment of Dismissal be entered pursuant to Federal Rules of Civil Procedure, Rule 54(b).

2. The Motions to Dismiss of the federal defendants are Denied.

3. The Motions for Summary Judgment of San Juan County and the State of Utah are Granted, and the court directs that a final Judgment of Dismissal be entered pursuant to Rule 54(b), as to all claims against San Juan County and the State of Utah.

4. The court's Order of December 7, 1979 permitting Southland Royalty Company to deposit state and local taxes with the court is Dissolved.

5. The pending Motions to Compel Discovery are Denied.
DATED this 5 day of June, 1980.

BY THE COURT:

/s/ BRUCE S. JENKINS
BRUCE S. JENKINS
United States District Judge

(2)
No. 84-68

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JUL 31 1984

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
IN SUPPORT OF THE PETITIONER**

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IN THE SUPREME COURT OF THE UNITED STATES

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KERR-McGEE CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF THE PETITIONER

INTERESTS OF THE AMICUS CURIAE AND INTRODUCTION

The amicus curiae Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is the managing agent of the Navajo Project, a coal-fired electric generating plant located on the Navajo Indian reservation in Arizona. The Navajo Project is co-owned by the amicus, the City of Los Angeles, Arizona Public Service Company, Nevada Power Company and Tucson Electric Power Company.

The amicus is also the managing agent of the Coronado coal-fired electric generating plant located off the Navajo reservation. It is co-owned by the amicus and the City of Los Angeles.

The plants are fueled in substantial part by on-reservation coal resources mined by the Peabody Coal Company, and the Pittsburgh and Midway Coal Company, respectively. To the extent that the Navajo Tribe can tax these fuel suppliers,¹ certain taxes would be passed along to the plants' owners under their coal supply contracts. The owners and their customers in Arizona, California, and Nevada can be directly affected by the outcome in this case.

The amicus urges this Court to grant Kerr-McGee Corporation's Petition for Writ of Certiorari because the opinion of the court below ignored the important role Secretarial approval plays as the only remaining check against unlawful tribal conduct and otherwise unrestrained tribal exercise of civil regulatory jurisdiction over nonmembers.

ARGUMENT

In *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 603-604 (9th Cir. 1984), the court below decided an important question of federal law in a way in conflict with the applicable decision of this Court. This is a classically cert-worthy case under Rule 17(1)(c), of the Rules of this Court. Without reference to the controlling decision of this Court, the court below held that the Navajo Tribe could tax non-Indians even without the approval of the Secretary of the Interior.² 731 F.2d at 604.

¹ By contract, the Navajo Tribe has promised not to tax the owners and Peabody Coal Company in connection with the Navajo Project. No such promise has been made to Pittsburgh and Midway Coal Company in connection with the Coronado plant.

² And even though the Treaty with the Navajo of 1868 put them under the management of the "proper agent." Art. 12(5). II C. Kappler, *Indian Affairs, Laws and Treaties*, 1015, 1019 (1904).

The important question of tribal taxing power over non-Indians was decided by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Over objections that non-Indians had no right to participate in tribal government, could have federal claims adjudicated in tribal forums without possibility of federal judicial review at any point, and that tribal taxing power was not limited by constitutional or statutory constraint, this Court nonetheless upheld the power of Indian tribes to tax non-Indians. The dissenting opinion of Justice Stevens, along with the Chief Justice and Justice Rehnquist, stated with great force the genuine dangers to civil liberties created by an acknowledgment of a tribal power to tax non-Indians. This Court's answer to the dissent's recognition of these dangers was as follows:

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and *the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect*. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

455 U.S. at 141 (emphasis added).

The dissent characterized the Secretary of the Interior's power to veto a tribal tax as a poor substitute for the "protection afforded by rules of law." 455 U.S. at 190. Certiorari must be granted in this case because the Ninth Circuit has abandoned even the minimal safeguard provided by Secretarial review, and did so without reference to this Court's opinion in *Merrion*.

That the fear of unfair or unprincipled application of the tribal power to tax is no mere abstraction is illustrated by the experience of the owners of the Navajo Project with both the Navajo and Hopi Indian Tribes. The Navajo Tribe expressly promised them that it would not tax the Navajo

Project or its coal supplier. This promise is contained in the lease under which the owners operate the Navajo Project electric generating plant. And yet soon after the plant's completion, the Tribe enacted the taxes which are the subject of the Petition before this Court and sought to apply them to the owners. The owners resisted these taxes in the United States District Court for the District of Arizona and in the United States Court of Appeals for the Ninth Circuit where, after full briefing and oral argument, the Tribe mooted the appeal by reaffirming its covenant not to tax.

The Hopi Indian Tribe enacted a coal severance tax on coal mined on lands off its reservation, and thus beyond its clear jurisdiction. The plants' owners and others appealed to the Secretary from the enactment of this tax through the administrative mechanism provided by the Hopi's Indian Reorganization Act constitution and federal regulations. The Secretary of the Interior vetoed the Hopi tax as being in violation of federal law, thus proving the wisdom of this Court's requirement that before a tribe can tax it must obtain the approval of the Secretary.

After this Court's decision in *Merrion*, the only thing which stands between the assertion of unlawful tribal power and non-Indians is Secretarial review. Non-Indians do not and cannot participate in tribal governmental power. And, after *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), non-Indians have no opportunity to present their Indian Civil Rights Act claims to a federal forum. State forums have no jurisdiction. A tribal forum is no forum at all because Indian tribes do not recognize the doctrine of separation of powers, and in any event, there is no federal judicial review, even by this Court, of the judgments of tribal forums, even over federal questions.

All that stands between this sorry state of affairs and non-Indians is the minimal protection this Court provided when it stated that tribes *must* obtain the approval of the Secretary before any tax on nonmembers can take effect. And yet the Ninth Circuit has eliminated even this, at best, marginal substitute for the protection afforded by rules of law.

This Court should grant the Petition for Writ of Certiorari to review this important question decided by the

Ninth Circuit in conflict with this court's decision in *Merrion*.

CONCLUSION

Many non-Indians live on non-Indian owned land within the exterior boundaries of Indian reservations. Others, including the amicus and its co-owners, do business on reservations. Non-Indians have no voice in tribal government, and therefore the important check of democratic control of governmental power is absent. Tribal power is not subject to constitutional or statutory limitation in any meaningful way. Federal rights can be lost or adjudicated in tribal forums with no possibility of federal or state judicial review. All that stands between the assertion of unlawful tribal power and non-Indians is the minimal protection afforded by this Court in *Merrion*: that before a tribe can tax nonmembers, it must obtain the approval of the Secretary of the Interior. Because the Ninth Circuit ignored this Court's opinion, the Petition for Writ of Certiorari of Kerr-McGee Corporation should be granted.

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IN THE
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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICI CURIAE ARIZONA PUBLIC
SERVICE COMPANY AND SOUTHERN CALIFORNIA
EDISON COMPANY IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

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INTERESTS OF THE AMICI CURIAE

The Amici have extensively researched the history of Navajo tribal government, including a review of all minutes of proceedings of the Navajo Tribal Council since the date of its creation by the Department of the Interior on January 27, 1923. This research uncovered statements to the Navajo Tribal Council by the Commissioner of Indian Affairs and other federal officials, contemporaneous with Acts of Congress bearing on tribal self-government, directly related to the powers of the Navajo Tribal Council in the absence of a congressionally authorized constitution. The

Amici believe that this historical analysis will assist this Court in understanding the extent to which that portion of the opinion of the lower court upholding the lawfulness of Navajo tax ordinances absent their approval by the Secretary of the Interior constituted a departure from the long-standing views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

Amicus Arizona Public Service Company is the project manager of the Four Corners Generating Station, a coal-fired electric generating facility owned by Arizona Public Service Company, Tucson Electric Power Company, Public Service Company of New Mexico, Southern California Edison Company, El Paso Electric Company, and Salt River Project Agricultural Improvement and Power District. The co-owners of that facility purchase coal for its operation from Utah International, Inc., a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation. Pursuant to the fuel supply contract with Utah International, the co-owners are obligated to pay, as an element in fuel costs, lawful taxes imposed by governmental authorities.

Amicus Arizona Public Service Company is also sole owner of the Cholla Generating Station, a coal-fired electric generating facility. Arizona Public Service Company purchases coal to operate this facility from Pittsburg and Midway Coal Company, a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation, under a fuel supply contract obligating the utility to pay, as an element in fuel costs, lawful taxes imposed by governmental authorities.

Amicus Southern California Edison Company is the project manager of the Mohave Generating Station, a coal-fired electric generating facility owned by Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Nevada Power Company, and the Department of Water and Power of the City of Los Angeles. The co-owners purchase coal to operate this facility from

Peabody Coal Company, a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation. Again, under the fuel supply contract for this facility, the co-owners are obligated to pay lawful taxes imposed by governmental authorities as an element of fuel costs.

The Navajo Tribal Council has enacted a Possessory Interest Tax ordinance and a Business Activity Tax ordinance, each of which is applicable to persons conducting business within the Navajo Reservation, including each of the above referenced coal suppliers. Each of the utilities named above is directly affected by these tax ordinances by virtue of the fuel supply contracts with their respective coal suppliers. In addition, because the costs incurred by these utilities, including taxes, generally are costs taken into account in the establishment of rates charged to consumers of electricity in the areas served by them, these tax ordinances indirectly affect the consumers of electricity in the States of Arizona, California, Nevada, New Mexico and Texas.

The amici submit that the petition for a writ of certiorari filed by Kerr-McGee Corporation should be granted to review that portion of the lower court's opinion holding that tax ordinances of the Navajo Tribal Council are effective without the approval of the Secretary of the Interior. The opinion of the lower court is at direct variance with this Court's opinion in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and wholly inconsistent with the longstanding views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

ARGUMENT

I. INTRODUCTION

The holding of the lower court that the two tax ordinances in question are effective, even absent the approval of the Secretary of the Interior, rests upon two fundamental (albeit unarticulated) and equally erroneous propositions:

- 1) That the Navajo Tribe without following procedures established by Congress for implementing tribal self-

government (and indeed, having rejected at least two invitations to pursue them) may nevertheless exercise the full measure of a retained power of inherent sovereignty free of supervision by the Secretary, and

2) That the Navajo Tribal Council is the body duly constituted and empowered to exercise sovereign powers for and on behalf of members of the Tribe, and free of supervision by the Secretary.

When these two bases for the lower court's decision are viewed in the light of the historical record concerning the tribal government reform movement, it can readily be seen that the lower court has declared two separate congressional enactments to have been wholly superfluous legislative exercises, and has imposed upon members of the Navajo Tribe a governing body never constituted by them.

II. HISTORY DEMONSTRATES THAT SECRETARIAL APPROVAL OF NAVAJO TRIBAL COUNCIL ORDINANCES IS ESSENTIAL TO THEIR EFFECTIVENESS.

A. The History of Navajo Tribal Government Demonstrates That The Navajo Tribal Council Has Not Been Empowered to Exercise Governmental Power Over Non-Indians Absent Secretarial Approval.

The Navajo Tribal Council is not the child of the Navajo people but, rather, was created by, and continues to exist by the authority of, regulations promulgated by the Secretary of the Interior. The Navajo people have never empowered the Navajo Tribal Council to exercise whatever sovereign powers might be possessed by the Navajo people, despite repeated attempts by Congress and the Executive Branch to encourage them to do so. The history of Navajo tribal government conclusively demonstrates that the Navajo Tribal

Council has never been empowered to enact legislation free of supervision and control by the Secretary of the Interior.¹

Until the first years of the Twentieth Century, the Navajo people did not have or recognize any tribal government which could speak for and bind all members of the Navajo Tribe. The fundamental, organic law of the Navajo people was embodied in the culture, traditions, customs and institutions comprising Navajo society which, in turn, was organized into inter-cooperating groups based on family relationships. *Plural Society* at 169-172. Navajo tradition and custom did not recognize any coercive power in the leadership of any group or in the group itself. Order was maintained and decisions of the group were enforced by argument, persuasion, urging and peer pressure. Delegation of power or authority to one Navajo or to a group of Navajos to supervise or direct the conduct of other Navajos was unknown and contrary to the culture, traditions, customs and institutions of the Navajo people. *A Political History* at 48-49, 91.

The dawn of "tribalism" on the part of the Navajo people has been traced to increased interest in the mineral deposits within the Navajo Reservation, paralleling the enactment by Congress of a series of statutes relative to the exploitation of mineral resources within Indian reservations. *A Political History* at 53-58. Under the pattern of legislation that

¹ The history of Navajo tribal government and the role of the Secretary of the Interior in managing the affairs of the Navajo Tribe is fully set forth in the writings of Dr. Robert W. Young. The principal writings of Dr. Young include: "The Origin and Development of Navajo Tribal Government," *The Navajo Yearbook, Report No. viii, 1951-1961 A Decade of Progress* 371 (1961), an official publication of the Department of the Interior prepared in conformance with the Navajo-Hopi Rehabilitation Act (hereinafter "Navajo Yearbook"); "The Rise of the Navajo Tribe," *Plural Society in the Southwest* 167 (E. Spicer and R. Thompson 1972) (hereinafter "Plural Society"); and *A Political History of the Navajo Tribe* (1978) (hereinafter "A Political History"). *The Navajo Yearbook* has been cited by this Court as an authoritative source on Navajo tribal government. See *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

existed in the early 1920's, mineral leases were permissible if entered into by the authority of a "council" speaking for the affected Indian tribe. *See, e.g.*, 25 U.S.C. §398. The absence of any recognized council authorized to speak on behalf of the Navajo Tribe caused a disruption in the manner in which the Department of the Interior supervised and managed the exploitation of mineral resources within the Navajo Reservation. *Navajo Yearbook* at 373-375.

After a period of confusion, on January 27, 1923, the Department of the Interior promulgated "Regulations Relating to the Navajo Tribe of Indians," which stated at section 3 that there "shall be created a continuing body to be known and recognized as the 'Navajo Tribal Council' with which administrative officers of the Government may directly deal in all matters affecting the tribe." *Navajo Yearbook* at 393. The 1923 Regulations, as revised from time to time, created a continuing body—not a governing body—and its purpose was very limited.² *Tribal government functioned under the supervision and control of the Secretary.*

On April 21, 1933, John Collier was appointed Commissioner of Indian Affairs. This appointment, echoing the era of the New Deal insofar as it pertained to Indian relations, brought changes in the approach of the federal government to the supervision of Indian tribes. This new approach was embodied in the Wheeler-Howard Act, also known as the

² "It must be noted that under the Regulations and pursuant to Federal policy in the 1920s, the Council thus created, not by the Navajo people but by the Secretary of the Interior, was *not*, in fact or in function, to be construed as a *governing body*. Nowhere in the Regulations was there any specific mention of tribal authorities or tribal powers. The Council could vote 'on all matters coming before it'—presumably to accept or reject them in the name of the Tribe, but the Regulations recognized no legislative powers in the Council, nor did they fix any executive authorities in the Council Chairman. The regulations opened no avenues through which the Tribe could *initiate* action for the benefit of the Navajo public." *A Political History* at 62 (emphasis in original). *See also A Political History* at 69.

Indian Reorganization Act, enacted by Congress on June 18, 1934. Generally, 25 U.S.C. §461 *et seq.*

The Indian Reorganization Act was not to apply to any reservation if a majority of the adult Indians voted against the application of the Act at a special election called by the Secretary of the Interior. 25 U.S.C. §478. Acceptance of the Act by the Navajo people was a matter of importance to the federal government. In early 1934, representatives of the Department of the Interior, including Commissioner Collier, visited Indian tribes throughout the United States to secure their preliminary approval of the principal features of the bill then pending in Congress. *See Cohen, Federal Indian Law* 129 (Revised by United States Interior Department 1958). Several meetings were held with the Navajo Tribal Council. Because contemporaneous constructions of the Indian Reorganization Act by officials of the Department of the Interior are persuasive and deserve the respect of courts interpreting its effect, *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982), a recital of statements by federal officials contemporaneous with enactment of the Indian Reorganization Act is essential to an understanding of the issue brought before this Court.³

³ This Brief sets forth excerpts from the minutes of meetings of the Navajo Tribal Council. Under the 1923 Regulations, which, with certain amendments, continued in effect until 1938, meetings of the Council were held at a time and place designated by the Commissioner of Indian Affairs, no meeting of the Council could be held without the presence of an official of the United States designated by the Commissioner of Indian Affairs, and the designated official was directed to keep a record of the proceedings of all Council meetings, with the original record of the proceedings being forwarded to the Commissioner of Indian Affairs. *See Navajo Yearbook* at 393-400. Under the 1938 Rules (*Infra* at 10), which were amended as late as 1966, meetings of the Council were called by the Commissioner of Indian Affairs upon request of the Executive Committee of the Council, and the Chairman of the Council was directed to make a proper record of the proceedings of all Council meetings. *See Navajo Yearbook* at 407-411. Thus, the minutes of meetings of the Navajo Tribal Council, being both authorized and required by federal regulations, constitute public records.

On March 12, 1934, Commissioner Collier met with the Navajo Tribal Council and, in explaining the advantages that might be derived from the self-government provisions of the bill then pending in Congress, described the then status of Navajo tribal government as follows (emphasis added):

The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny everyone of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.

In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have. He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner. There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. Now what we are seeking in this Title

One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs. And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Fort Defiance, Arizona, March 12, 1934.

On April 9, 1934, Mr. J. M. Stewart, a subordinate of Commissioner Collier, once again met with the Navajo Tribal Council to discuss the self-government provisions of the bill then pending in Congress, and answered questions from members of the Council in the following manner:

Q. Do we have any power now as a nation?

A. Not under existing law, no.

* * *

Q. It seems that we have a voice in a lot of matters we have already undertaken, such as the council election. We have a voice in the election of our head men. These have been recognized by the people.

A. You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. You have no authority under the present set-up.

* * *

Q. Isn't it possible that the Navajos can get by without a charter?

A. Of course, any Indian tribe can get by without it.

Q. I mean and still have power.

A. No, in order to get the benefits, educational and other, there must be a charter granted.

Minutes of the Special Session of the Navajo Tribal Council, 24, 27, held at Crownpoint, New Mexico, April 9, 1934.

In an election held on June 17, 1935, the Navajo people rejected the application of the Indian Reorganization Act by a vote of 7,992 to 7,608. *Navajo Yearbook* at 377. As a result, the Tribal Council continued to exist by virtue of the 1923 Regulations, as amended. *Tribal government continued to function under the supervision and control of the Secretary.*

In the face of the rejection of the Indian Reorganization Act by the Navajo Tribe, Commissioner Collier went forward with attempts to reorganize the Tribal Council through administrative proceedings and amendments to federal regulations. The result of this attempt was the convening of a constitutional assembly in April, 1937, consisting of tribal delegates from throughout the Navajo Reservation. The intent and purpose of this constitutional assembly was to organize itself and declare itself to be the Navajo Tribal Council, and thereafter seek its approval by the Secretary of the Interior and Congress as the authorized body entitled to speak for the Navajo people. Although a draft of a proposed constitution was prepared by the constitutional assembly and submitted to the Secretary for approval, this draft of a constitution was never placed into effect in any manner whatsoever.⁴ See generally *Navajo Yearbook* at 376-82; *A Political History* at 91-98, 106-108.

On July 26, 1938, the Secretary promulgated "Rules for the Tribal Council." The 1938 Rules provided only the barest framework for organization of Navajo tribal government. Although the Navajo Tribal Council was designated as the "governing body of the Navajo Tribe," the extent of its power was not described. *Navajo Yearbook* at 407-411.

⁴ Commissioner Collier recommended secretarial approval of this constitutional assembly, justifying the ultimate result on the theory that the Navajo Tribal Council, as existing or as reorganized, would be an institution created by the Secretary with authorities derived from regulations promulgated by the Department of the Interior. Memorandum dated March 23, 1937, from Commissioner Collier to the Secretary of the Interior, cited in *Navajo Yearbook* at 381. Thus, even if the efforts of the constitutional assembly had been successful, the Tribal Council created thereby would have functioned under the supervision and control of the Secretary.

*Tribal government continued to function under the supervision and control of the Secretary.*⁵

The status of Navajo tribal government after rejection of the Indian Reorganization Act is illustrated by a statement made in 1948 before the Navajo Tribal Council by Mr. J. M. Stewart, then Superintendent, in response to an inquiry from a Council member on the powers of the Council (emphasis added):

Mr. Stewart: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation, but the legislation is not effective unless approved by the President, except under certain conditions. And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs. . . .

• • •

Now to answer Joe very directly. My personal feeling and understanding is that *the Navajo Tribal Council does not have the authority to demand. It has only the authority to request.*

Minutes of Proceedings of the Meeting of the Navajo Tribal Council, 29-30, held at Window Rock, Arizona, June 26-29, 1948.

The rejection of the Indian Reorganization Act by the Navajo people effectively negated the existence of any congressional authorization for a procedure whereby the Navajo

⁵ "[A]side from controlling personal relations, the Council has few powers of an autonomous governing body. Most action it takes is initiated by the government, and its functions are mainly to approve or disapprove government proposals or to advise with administrators, rather than to initiate policy or pass laws. Furthermore, any actions which it takes that are deemed not in the best interests of The People can be disapproved by the Secretary of the Interior. Thus the Council can bring pressure on administrators, but actual legislation and administration are still largely in the hands of the Indian Service. These limitations stem primarily from the tribal rejection of the Indian Reorganization Act in 1934 [sic]." Clyde Kluckhohn & Dortha Leighton, *The Navajo* 102 (1946).

Tribe could free itself from complete supervision and control by the Secretary. In response to this situation, the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §631 *et seq.*, included an authorization for the Navajo people to adopt a tribal constitution by majority vote of adult members of the Tribe. 25 U.S.C. §636. ⁶ The Navajo people have not adopted a constitution pursuant to this congressional authorization. As late as 1968, the Navajo Tribal Council formulated a constitution and adopted a resolution calling for its submission to the Navajo people for their approval, but no such action was ever taken and the perceived need for a tribal constitution remains unsatisfied. *Minutes of Sessions of the Navajo Tribal Council*, held at Window Rock, Arizona, November 14, 1968.

The 1938 Rules, with a number of amendments approved by the Secretary of the Interior, continue as the basis for the present Navajo tribal government. *Navajo Yearbook* at 384, 387; *A Political History* at 114. Thus, the 1938 Rules pertaining to tribal elections were revised on several occasions, and in each instance these revisions were submitted to the Secretary of the Interior for approval prior to their effectiveness. *Navajo Yearbook* at 387, 412, 419; *Plural Society* at

⁶ Although the Navajo-Hopi Rehabilitation Act mentions the Navajo Tribal Council, 25 U.S.C. §§635, 636, 637, 638, the Act does not recognize any independent governmental power in the Navajo Tribal Council, either directly or by implication. Indeed, with the exception of provisions dealing with land, 25 U.S.C. §635, all other provisions of the Act recognize the continuing supervision of the Navajo Tribe by the Secretary of the Interior. Thus, although the Act authorized the Navajo Tribal Council to formulate a constitution, the constitution could be effective only after a vote of the Navajo people in a secret ballot election conducted under regulations prescribed by the Secretary. 25 U.S.C. §636. Similarly, although the Act authorized the Tribal Council to designate the manner of expenditure of tribal funds, such expenditure continued to require the approval of the Secretary. 25 U.S.C. §637. Finally, although the Act required that the Tribal Council be kept informed and afforded the opportunity to participate in the rehabilitation program authorized by the Act, the Secretary was directed to follow any recommendation of the Council only when "he deems them feasible and consistent with the objectives" of the Act. 25 U.S.C. §638.

215-216. Equally instructive is the manner in which the Navajo Tribe adopted its law and order code.

On June 2, 1937, the Secretary of the Interior approved a law and order code applicable on Indian reservations. 25 C.F.R. Part 11 (1977). For many years these regulations applied in full to the Navajo Tribe. At times relevant to this discussion, 25 C.F.R. §11.1 stated, in part, as follows:

(a) The regulations in this part relative to Courts of Indian Offenses shall apply to all Indian reservations on which such courts are maintained.

* * *

(d) The regulations in this part shall continue to apply to tribes organized under the [Indian Reorganization Act] until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective . . .

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

Because the members of the Navajo Tribe never adopted a constitution under the Indian Reorganization Act, the Navajo Tribe was unable to substitute its own law and order code pursuant to 25 C.F.R. §11.1(d). Nevertheless, the Navajo Tribe sought to assume responsibility for the administration of law and order on the Navajo Reservation pursuant to 25 C.F.R. §11.1(e).

On January 6, 1959, the Navajo Tribal Council adopted Resolution CJA-1-59, entitled "Adopting as tribal law the law and order regulations of the Department of the Interior on a temporary basis," which was approved by the Secretary of the Interior on February 11, 1959, and which stated, in part:

1. Pending the adoption by the Navajo Tribe and approval thereof by the Secretary of the Interior of a permanent law and order code, the law and order regulations of the Department of the Interior, 25 C.F.R., as

modified, amended or amplified by ordinance and resolutions of the Navajo Tribal Council, heretofore approved by the Secretary of the Interior, are hereby adopted as tribal law, . . .

* * *

3. Except in Sections 11.1(e), 11.2(d) and 11.26, whenever the titles Secretary of the Interior, Commissioner of Indian Affairs, or Superintendent appear, the title Chairman of the Navajo Tribal Council is substituted therefor.

Section 1 of Resolution CJA-1-59 incorporated the law and order regulations of the Department of the Interior as modified, amended or amplified by resolutions of the Tribal Council *heretofore* approved by the Secretary. By specifically providing that the title "Secretary of the Interior" would remain in Section 11.1(e) after adoption of the federal regulations as tribal law, the Secretary reserved his authority to approval all *future* resolutions of the Tribal Council.⁷

B. The Navajo Tribe has Failed to Follow the Procedure, Twice Delineated by Congress, Necessary to Free Itself From Federal Control and to Exercise Powers of Self Government.

It is beyond dispute that both the Indian Reorganization Act of 1934, generally 25 U.S.C. §461 *et seq.*, and the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §631, *et seq.*, were intended by Congress, and viewed by the Secretary, as remedial measures enacted to foster tribal self-government by providing the means by which tribes, by adopting a constitution, could not only free themselves from

⁷ In *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962) *cert denied*, 372 U.S. 908 (1963), the court held that approval of Resolution CJA-1-59 by the Secretary was a valid exercise of the Secretary's authority under 25 C.F.R. §11.1(e). The court's broad assertion that the action of the Secretary constituted his consent to the supersession of 25 C.F.R. Part 11, a correct statement insofar as pertinent to the decision in that case, clearly is incorrect to the extent it implies a complete relinquishment by the Secretary of his authority over future resolutions adopted by the Council, an implication clearly denied by Section 3 of Resolution CJA-1-59.

absolute domination by the Department of the Interior, but also "stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, power." S. Rep. No. 1080, 73rd Cong., 2d Sess., 1 (1934). The opinion of the lower court makes a mockery of this congressional purpose.

In the Indian Reorganization Act, Congress established a procedure for Indian tribes to follow in order to free themselves from federal domination and control and to exercise powers of self government. In Section 6 of the Navajo-Hopi Rehabilitation Act, 25 U.S.C. §636, Congress specifically established the procedure for the Navajo Tribe to follow in order to achieve self-government. The reasoning of the Ninth Circuit makes both of these acts not only superfluous legislative exercises, but hypocritical acts which achieve the exact opposite of their stated purpose.

Under the lower court's reasoning, the only tribes that benefited from the Indian Reorganization Act were those tribes that refused to adopt a constitution as permitted by the Act; these tribes, and only these tribes, remain free from federal control. Under this reasoning, Indian tribes which adopted a constitution under the Indian Reorganization Act did not free themselves from federal domination but, rather, imposed upon themselves federal constraints that previously did not exist under the law. The lower court's message is clear: Indian tribes which elected to participate in an historic Indian law reform movement by adopting a constitution under the Indian Reorganization Act were duped by two branches of the federal government—legislative and executive—into *surrendering* rights under the guise that they were *acquiring* rights. For example, the Jicarilla Apache Tribe in *Merrion*, *supra*, which adopted a constitution authorizing the tribe to tax non-Indians only with the approval of the Secretary of the Interior, is viewed as giving away an aspect of its independence by doing so. Viewed from the historical perspective the Ninth Circuit's analysis simply doesn't make sense.

Neither the Indian Reorganization Act nor the Navajo-Hopi Rehabilitation Act requires the adoption of a constitution by any Indian tribe. Furthermore, neither the Indian Reorganization Act nor the Navajo-Hopi Rehabilitation Act creates tribal sovereign powers. However, both of these Acts have been described as regulating "the manner and extent of the tribal power of self-government." See *United States v. Wheeler*, 435 U.S. 313, 328 (1978). The determination that these Acts neither *require* the adoption of a constitution nor *create* tribal sovereign powers does not compel the conclusion that Indian tribes may, without reference to the *procedure* set forth in these Acts, exercise unfettered powers of self-government, applicable to Indians and non-Indians alike, free of federal supervision and control. Indeed, the history of Navajo tribal government, particularly by reference to statements to the Navajo Tribal Council by the Commissioner of Indian Affairs and other federal officials, both before and after the adoption of the Indian Reorganization Act, compels the contrary conclusion. See Section II.A., of this Brief, *supra*.

C. The Ninth Circuit Has, in Effect, Created a Governmental Authority Authorized to Exercise the Inherent Sovereign Powers of the Navajo People Without Their Consent.

In the face of the Navajo Tribe's refusal to organize itself and to adopt a constitution, as permitted by Congress, the Ninth Circuit has taken it upon itself to appoint the Navajo Tribal Council as the tribal government by judicial fiat. The members of the Navajo Tribe, however, have never invested the Navajo Tribal Council with any governmental power. The Council began as, and continues to exist as, a creature of federal regulations.

The amici are unable to identify any event that transformed the Navajo Tribal Council from an agency created by federal regulations promulgated by the Secretary for the administrative convenience of the Department of the Interior into an agency empowered to exercise the sovereign powers of the Navajo people free of federal supervision and

control.⁸ The opinion of the lower court necessarily is based upon the theory that a tribal government capable of exercising sovereign powers free of federal supervision and control can give birth to itself by evolution or public perception—a sort of political Darwinism—without congressional authorization. This theory is contrary to a fundamental principle of American jurisprudence: "In this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 (1979), *reh'g denied*, 441 U.S. 917 (1979).

The petition for a writ of certiorari should be granted to rectify the lower court's unwarranted departure from the long-standing views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

⁸ This Court has on occasion alluded to Navajo tribal government, but the Court has never addressed the fundamental issues presented by the petition for a writ of certiorari. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court noted that both the Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act authorized the Navajo Tribe to adopt a constitution for self-government, but there is no indication that the Court was aware that the Navajo people have never adopted a constitution under either statute. In *Williams v. Lee*, 358 U.S. 217 (1959), this Court pointed to the Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act as congressional encouragement for the formation of tribal government and found implicit in treaties between the Navajo Tribe and the United States "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed," *Id.*, 358 U.S. at 221-2, but the Court at no time gave recognition to the failure of the Navajo people to adopt a constitution pursuant to either of these statutes; the reference to "whatever tribal government existed" cannot be stretched, by any theory of the elasticity of the English language, to encompass a recognition by the Court that the Navajo Tribal Council may exercise the sovereign powers of the Navajo people free of federal supervision and control.

III. THE DECISIONS OF THIS COURT REQUIRE FEDERAL APPROVAL OF TRIBAL TAX ORDINANCES APPLICABLE TO NON-INDIANS

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court upheld a tax ordinance enacted by the Jicarilla Apache Tribe, and approved by the Secretary of the Interior, pursuant to a provision in the Tribe's constitution adopted under the Indian Reorganization Act with the approval of the Secretary.⁹ The adoption of a constitutional provision authorizing the tax before its imposition was viewed by the Court as "the critical event necessary to effectuate the tax." *Id.*, 455 U.S. at 148, n. 14 (emphasis in original). The Court recognized that a requirement of secretarial approval of tribal tax ordinances applicable to non-Indians served to "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies." *Id.*, 455 U.S. at 141. The Court referred to the two-stage approval process as "a series of federal check-points that must be cleared before a tribal tax can take effect" and a "process established by Congress to monitor such exercises of tribal authority." *Id.*, 455 U.S. at 155. The opinion of the lower court upholds tribal taxation of non-Indians without regard to secretarial approval and sanctions the imposition of tribal taxes on non-Indians

⁹ Unlike the members of the Jicarilla Apache Tribe, the Navajo people have never adopted a constitution vesting in the Navajo Tribal Council the right to exercise their sovereign powers. Furthermore, unlike the resolutions at issue in *Merrion*, the tax ordinances of the Navajo Tribal Council have never been approved by the Secretary of the Interior.

without the minimal protection afforded to the taxpayers in *Merrion*.¹⁰

The opinion of the lower court is directly contrary to the prior decisions of this Court. The petition for a writ of certiorari should be granted to rectify this unwarranted departure from existing precedent.

IV. CONCLUSION

The opinion of the lower court raises critical policy issues affecting the exercise of powers of self-government by every Indian tribe in the United States. For an Indian tribe adopting a constitution under the Indian Reorganization Act, the opinion creates a clear incentive to rescind that constitution, thereby eliminating any requirement that tribal ordinances be approved by the Secretary of the Interior. For an Indian tribe not adopting a constitution under the Indian Reorganization Act, the opinion creates a clear disincentive to organize under congressional authorization and gives rise to an atmosphere of lawlessness in which no person, Indian or non-Indian, is able to ascertain either the source of authority for the enactment of tribal ordinances or the existence of any limitations on the exercise of that authority.

¹⁰The *Merrion* decision's requirement of secretarial approval is consistent with all prior decisions of this Court, and all lower federal court decisions cited with approval by this Court, relative to tribal taxation of non-Indians. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), *reh'g denied*, 448 U.S. 911 (1980), tribal tax ordinances were approved by the Secretary of the Interior. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F., 947 (8th Cir. Indian Terr. 1905), *appeal dismissed*, 203 U.S. 599 (1906), the tribal enactment at issue was authorized by the Curtis Act of June 28, 1898, Ch. 517, 30 Stat. 495, which specifically provided that tribal enactments were not effective until approved by the President of the United States. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), and *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), the Oglala Sioux Tribe had implemented its sovereign taxing power by adoption of a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act.

Respectfully submitted this 30th day of July, 1984.

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By/s/ ROBERT B. HOFFMAN
 Robert B. Hoffman

No. 84-68

IN THE
 SUPREME COURT OF THE UNITED STATES

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents

CERTIFICATE OF SERVICE

Robert B. Hoffman hereby certifies:

1. That he is an active member of the Bar in this Court and that he is an attorney for the amici curiae Arizona Public Service Company and Southern California Edison Company.

2. That the Brief of Amici Curiae to which this Certificate is attached has been served upon all counsel of record in accordance with the provision of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed this 30th day of July, 1984 to each of:

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3. That the foregoing represents service on all parties required to be served under the provision of Rule 28 of this Court.

/s/ ROBERT B. HOFFMAN
Robert B. Hoffman

4
No. 84-68

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**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICI CURIAE IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

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OF PETITION FOR WRIT OF CERTIORARI

Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, Anadarko Production Company, and Texaco, Inc., respectfully submit this brief as amici curiae in support of petitioner Kerr-McGee Corporation's petition for writ of certiorari. The written consent of the attorneys for petitioner and respondents for the filing of this brief has been obtained and filed with the Court.

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INTEREST OF AMICI CURIAE

Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, Anadarko Production Company and Texaco, Inc., produce oil and gas from portions of the Navajo Indian Reservation in Utah under leases from the Navajo Tribe of Indians. If the Navajo Business Activity Tax and Possessory Interest Tax at issue in this case are ultimately upheld, these companies will, like petitioner, be required to pay those taxes.

The tribal leases under which these companies produce oil and gas on the Navajo Reservation were executed as early as 1947, and were all executed more than a decade before 1978, when the Navajo Tribal Council adopted the Business Activity Tax and the Possessory Interest Tax. The United States Department of the Interior approved the terms of each of these leases pursuant to 25 U.S.C. §§ 81 and 415 and the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.* For a period of up to thirty years, these amici have developed the oil and gas reserves covered by their tribal leases on the Navajo Reservation in Utah. All of these operations have been supervised in detail by the Interior Department pursuant to federal regulations promulgated under section 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396d. *See* 25 CFR § 211.1 *et seq.* (1983). Amici paid millions of dollars in cash bonuses to the tribe to secure the leases; Phillips Petroleum Company, Shell Oil Company and Chevron U.S.A., Inc. alone paid the Navajo Tribe more than \$3,000,000 in

bonuses for leases in Utah between 1953 and 1959. Since acquiring the leases, amici have paid the tribe federally approved royalties of between 12.5 percent and 40 percent of the value of oil and gas produced and saved. Over the past decade amici have expended substantial sums for new wells and for secondary recovery measures aimed at increasing the productive life of oil and gas wells on the Navajo Reservation.

The substantial investment of these companies was made on the assumption that the Secretary of the Interior would continue to supervise oil and gas development and operations on tribal lands. The decision below, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597 (9th Cir. 1984), undermines that fundamental assumption of comprehensive federal supervision. It is now doubtful whether the Interior Department will be able, in the face of an independent tribal power of taxation, to guarantee the integrity of consensual relations between the tribe and energy producers who have spent millions of dollars developing tribal reserves.

Amici have themselves challenged the Navajo Business Activity Tax and the Possessory Interest Tax in litigation pending in the Tenth Circuit. See *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). The Tenth Circuit's decision in *Southland*, rendered August 22, 1983, held that federal law does not require the Secretary of the Interior's review of these taxes and that the tribe's taxing power over oil and gas lessees is not divested by federal authority. 715 F.2d at 489. On September 20, 1983, amici peti-

tioned the Tenth Circuit for rehearing in the *Southland* cases and suggested that rehearing be held *en banc*. Our petition for rehearing is pending.

Amici thus have a direct and vital interest in the issues presented in Kerr-McGee Corporation's petition. The outcome of this case and of the *Southland* cases will determine the viability of amici's investments in the Navajo Reservation and will shape future decisions to undertake energy development of tribal lands throughout the United States.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit below that Secretarial approval is not a prerequisite to the validity of Navajo taxes on oil and gas property and production nullifies the explicit guarantee of federal oversight in 25 U.S.C. §396d. The Ninth Circuit's decision on this point also conflicts with this Court's assurances of continued federal supervision of tribal energy taxes. Unrestrained tribal taxation, besides undermining the assumptions on which producers undertook development of Navajo lands, will impose economic burdens felt on a national scale. The decision below will induce other tribes presently subject to federal supervision to shed that supervision and tax energy producers unconstrained by federal authority.

The decision of the Ninth Circuit that federal law has not divested the Navajo Tribe of its power to tax energy producers violates the established rule of federal supervision in the area. The result will be a patchwork

of taxes, varying arbitrarily from reservation to reservation, bearing no relation to any uniform federal policy.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE CONTROLLING ACT OF CONGRESS AND WITH THE ASSURANCE OF SECRETARIAL REVIEW OF TRIBAL TAXES IN *MERRION V. JICARILLA APACHE TRIBE*.

The Ninth Circuit held that neither the Indian Mineral Leasing Act nor the Indian Reorganization Act, 25 U.S.C. §461 *et seq.*, requires the Secretary of the Interior's approval of tribal taxes on tribal oil and gas lessees as a prerequisite to their validity. *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984). In doing so, the Ninth Circuit ignored the necessarily comprehensive character of the Secretary's duties under the Indian Mineral Leasing Act and the importance of federal oversight where Indian tribes endeavor to tax oil and gas producers. The Ninth Circuit's decision conflicts with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), in which the Court repeatedly emphasized that the requirement of Secretarial approval would continue to protect lessees against unfair and unprincipled uses of the tribal power to tax non-Indians.

The Ninth Circuit's decision on this point undermines the principles on which energy companies like amici based their decision to do business with the Navajo

Tribe in the first place. Amici and other energy companies undertook the investment necessary to develop oil and gas reserves on Navajo lands on the assumption that the Secretary of the Interior would supervise leasing and operations on those lands. This assumption was based upon the explicit guarantee of federal law. Section 4 of the Indian Mineral Leasing Act, 25 U.S.C. §396d, provides that all operations under any tribal oil and gas lease shall be subject to regulations promulgated by the Secretary of Interior. Although the proviso in section 2 of the Act, *id.* §396b, permits tribes organized under the Indian Reorganization Act to make oil and gas leases in accordance with their federally approved charters, no similar dispensation exists for tribes, like the Navajo, that have never organized under federal law. As to these tribes, Congress could not have made plainer its intention that the Secretary should exercise full control over the leasing and operation of oil and gas properties held in trust for the tribe.

The Secretary does not fulfill his obligation to supervise those operations effectively if he permits the government of the Navajo Tribe to manage in his place. In adopting taxes on energy producers' property and revenue, the tribe exercises the power to regulate those operations just as surely as if it were to dictate the terms and conditions of each of its leases. If, as the Ninth Circuit's decision below held, Navajo taxes become effective without Secretarial review, the tribe's power of regulation is unilateral and complete. It is, in short, the absolute power to drive producers from the reservation irrespective of their compliance with the very leases

whose terms were approved by the Interior Department decades ago. Amici by no means exaggerate in contending that Navajo taxing power, unfettered by the requirement of Secretarial review, threatens the considerable investment of these companies in the Navajo oil fields over the past three decades.

If the Ninth Circuit's decision is correct and the Navajo taxes do not require Secretarial approval, there apparently remains nothing but the tribal government's self interest to limit the extent of taxation. Traditional constitutional guarantees against confiscatory taxation may not protect energy producers against tribal excesses. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that, although local powers of tribal self-government are subject to federal legislative authority, such powers are not subject to the constraints of the Fifth Amendment). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding that the provisions of the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.*, do not authorize private causes of action for violations of its guarantees against tribes or their officers). Moreover, because non-Indians are excluded from participating in the government of the Navajo Tribe, traditional political constraints on tribal taxation of energy companies are nonexistent. There is no representation within the Navajo Tribal Council for the very parties required to bear the greatest burden of these tribal taxes.

It is therefore important that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), emphasized the continued dominance of federal supervision over tribal

mineral taxes. In *Merrion*, the Court held that the Indian Mineral Leasing Act "does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its revised constitution, *when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary.*" 455 U.S. at 148 (emphasis added). The Court observed that the Jicarilla Apache Tribe's authority to tax nonmembers is "subject to constraints," including that "the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect." *Id.* at 140. The Court then said:

These additional constraints minimize the potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 141.

The decision of the Ninth Circuit below and the decision of the Tenth Circuit in *Southland* (now pending reconsideration) both omit any mention of *Merrion's* constraints against tribal excess. Quoting *Southland*, the Ninth Circuit held that "[t]he self-sufficiency of the Navajo Tribe could be impaired by the imposition of a requirement of secretarial approval of its actions as to taxes." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984). These decisions miss four facts central to the dispute between the Navajo Tribe and energy producers.

First, economic burdens on oil and gas production from the Navajo Reservation will be felt far beyond the

boundaries of the Navajo Nation. The Navajo Tribal Council has characterized the Navajo Nation as "a principal supplier of crucial energy resources critical to the development of the United States economy."¹ As well it might. Between 1968 and 1975 Navajo Tribal lands yielded more than 100 million barrels of oil, more than 64 million tons of coal, and more than 105 million cubic feet of natural gas. The Utah portions of the Navajo Reservation have produced more than 200 million barrels of oil and more than 210 billion cubic feet of natural gas since the Utah Division of Oil, Gas and Mining began to keep production records in the early 1950's. The sheer scale of energy development on Navajo lands engages the national interest in maintaining a critical domestic source of energy. Although Secretarial approval of Navajo energy taxes would impose limits on the tribe's powers of self-government, the stakes for the nation as a whole are too high to permit Navajos the unsupervised power to choke energy development with oppressive taxes.

Second, the right of reservation Indians to "make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), is not infringed merely because their tax revenues might diminish as the result of some lawful restraint. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980) (holding that the State of Washington would not infringe the tribes' right of self-government by depriving the tribes of revenue which they were cur-

¹ "Navajo Energy Policy", adopted by the Navajo Tribal Council as Resolution CAP-34-80 (April 29, 1980).

rently receiving). To the contrary, tribal sovereignty is subordinate to the policies of the national government. As the Court said in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978):

Upon incorporation into the territory of the United States, the Indian Tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.

Third, without Secretarial approval of tribal energy taxes, there exists no constraint against the unprincipled exercise of the power to tax and no assurance that tribal taxes will be consistent with the national policies implemented in the Indian Mineral Leasing Act. If the "series of federal check-points" referred to in *Merrion*, 455 U.S. at 155, are absent, then the Navajo Tribe will be left at large to manipulate for its own purposes the leasing program that Congress entrusted to the Secretary's care.

Finally, the Secretary's responsibility to regulate "all operations under any [tribal] oil, gas or other mineral lease," 25 U.S.C. §396d, must include, at a minimum, the duty to review tribal taxes that threaten the viability of leases approved by the Secretary and might terminate operations undertaken in accordance with federal regulation. The Indian Mineral Leasing Act is "the comprehensive law covering mineral leases on unallotted lands." *F. S. Cohen, Handbook of Federal Indian Law* 328 (G.P.O. ed. 1940). In earlier decisions, lower federal courts have broadly construed the Secretary's duties

under similarly comprehensive Indian legislation. See, e.g., *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 548 (1983); *Udall v. Littell*, 366 F.2d 668, 672-73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *Armstrong v. United States*, 306 F.2d 520, 522 (10th Cir. 1962).

A number of these amici conduct oil and gas operations on lands of tribes organized under the Indian Reorganization Act and are subject to tribal taxes on energy production which have been reviewed and approved by the Secretary of the Interior. For example, Phillips Petroleum Company produces oil and gas from the Jicarilla Apache Reservation in New Mexico, where it is subject to the tribal severance tax upheld in *Merrion*, and from the Blackfoot Reservation in Montana, where it is similarly subject to a Secretary-approved tax on production. If the decision of the Ninth Circuit is permitted to stand, these organized tribes are implicitly encouraged to shed their organized status.² If the constraint imposed by Secretarial approval does not apply to unorganized tribes, tribes like the Jicarilla Apache and the Blackfeet may naturally choose to take steps to eliminate the constraint. The result for amici and other energy producers would be a patchwork of tribal taxes, shaped by the desires of a multitude of sovereignties, completely outside the control of the Interior Depart-

² Federal regulation permits tribes to revoke their constitutions and bylaws on a majority vote. 25 CFR §81.7 (1983). Unless the existing constitution provides otherwise, revocation does not become effective until it is approved by the Secretary of the Interior. *Id.*

ment. Certainly this result does not square with Congress's mandate that *all* oil and gas operations on tribal lands are to be subject to Secretarial control. Nor does this result square with *Merrion's* assurance that Secretarial review would continue to restrain tribal taxing authority. It was clearly Congress's intent to encourage tribes to organize under the Indian Reorganization Act. But the Ninth Circuit's decision discourages them from doing so and in fact motivates previously organized tribes to revoke their federally-approved governments.

II. THE DECISION BELOW CONFLICTS WITH THE ESTABLISHED PRINCIPLE OF FEDERAL DIVESTITURE OF TRIBAL SOVEREIGNTY

The Ninth Circuit also held that the Indian Mineral Leasing Act did not divest the Navajo Tribe of its power to tax oil and gas producers. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, *supra*, 731 F.2d at 601. The court below reached this conclusion on the grounds that (1) the purpose of the Act "was not to generate distinctions" between tribes organized under the Indian Reorganization Act, whose taxing authority was not divested, and tribes not so organized, and (2) nothing in the Indian Mineral Leasing Act mentions tribal taxation. *Id.* The consequence of the Ninth Circuit's decision will be the elimination of federal policy as the guiding principle for tribal energy development outside the Indian Reorganization Act.

The decisions of this Court have repeatedly held that the overriding interests of the national government,

and particularly the comprehensive enactments of Congress reflecting the national interest, divest tribal sovereignty as a power subordinate to the federal authority. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, *supra*, 435 U.S. 209 (1978). As the Court said in *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*, 447 U.S. at 152-53:

The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependant status.

* * *

This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government

Id. (emphasis added).

In *Merrion*, the Court considered at length petitioners' argument that the Indian Mineral Leasing Act divested the Jicarilla Apache Tribe's power to impose an oil and gas severance tax. The Court held that the Act did not divest the tribe's taxing power because of section 2's explicit exception, for the benefit of organized tribes, to the general rule of federal dominance. *Merrion v. Jicarilla Apache Tribe*, *supra*, 455 U.S. at 148. The implication of the Court's analysis is that other tribes — those without Secretary-approved governments under the Indian Reorganization Act — do not retain the power to regulate their own oil and gas leasing through taxation. Any other result would erase Congress's distinction between organized and unorganized tribes and would

undermine the goals that Congress intended to advance in making the distinction.

Congress's express purpose in enacting the Indian Mineral Leasing Act was "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H. R. Rep. 1872, 75th Cong. 3d Sess. 1 (March 3, 1938). That goal was advanced in the case of organized tribes by the requirement of prior Secretarial approval of tribal resolutions affecting the leasing of oil and gas property. See *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981), *cert. denied*, 459 U.S. 916 (1982) (stating that the Act gave organized tribal governments "control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary"). In the case of tribes not so organized, the goal can only be met by the continued supervision of the federal authority over oil and gas leasing and operations. If tribes having no authority from Congress are left unsupervised to tax the business or property of their lessees, the effective burden on lessees will vary arbitrarily from reservation to reservation, and a uniform national policy will cease to be a reality. The Secretary's prescription of uniform terms of compensation in tribal leases and his exclusive power to fix higher rates of royalty³ will become irrelevant if

³ 25 CFR §211.13 (1983) prescribes a per acre lease rental of \$1.25 and a royalty of 12½ percent in all tribal leases. The same regulation provides, however, that "[a] higher rate of royalty may be fixed by the Secretary of the Interior or his authorized representative, prior to the advertisement of land for oil and gas leases."

unregulated tribes, with no authority from Congress, may exact taxes at will.

Navajo taxation is at odds with continued orderly development of tribal resources under the leasing plan envisioned in the Indian Mineral Leasing Act. The power of the Navajos to tax producers is the power to drive producers from the reservation — despite the will of Congress and despite the Secretary's approval of the producers' leases. This was the essential point of the Attorney General of the United States when he concluded in 1824 that the Cherokee Nation had no right to impose a tax on federally licensed traders:

[I]f the Cherokee nation have the right to tax at all, the quantum of the tax rests in their sole discretion. If they have a right to impose a tax of \$50, they have the same right to impose a tax of \$500, \$5,000, or \$50,000 . . . The treaties having given to Congress the right to create these regulations of trade, a power to destroy them is a wholly incompatible power; and a power to tax, as the Supreme Court has said, is, virtually, a power to destroy.

1 Op. Att'y Gen. 645, 650 (1824). In short, the Attorney General concluded, the power of tribes to tax transactions committed to federal regulation is wholly inconsistent with Congress's supreme authority:

The question is whether a right on the part of the Cherokee nation to tax the traders thus licensed on the part of the United States be compatible with that sole and exclusive right to regulate the trade from which the authority of the li-

cense proceeds? The imposition of the tax on the traders is the imposition of a new condition, on which alone the Cherokees say that this trade shall be carried on. It is a new regulation of the trade instituted by them, while the sole and exclusive power to regulate it is acknowledged by the treaties to be in the Congress of the United States. Is this sole and exclusive power in Congress consistent with the existence of a like power in a separate and independent sovereign, directed by a different judgment and a different will? I apprehend not.

Id. at 562. The Interior Department has repeatedly reaffirmed the correctness of this opinion since 1824. See, e.g., 55 I.D. 14, 48 (1934); 60 I.D. 176, 180 (1948); *Interior Department Handbook of Federal Indian Law* 886 (Official ed. 1958).

The federal interests advanced in careful regulation of oil and gas production on tribal lands are, we submit, expotentially more significant than the government's interests in Indian trading. Unregulated economic burdens on the development of the vast reserves underlying the 14 million acre Navajo Reservation will pose grave risks to the tribe, to the producers, and to the public, which buys the energy produced from the Navajo reservation. The Navajo taxes are not only inconsistent with the principle of federal regulation; these taxes may well undermine the most fundamental goals of federal regulation.

CONCLUSION

For the foregoing reasons, these amici respectfully urge the Court to grant Kerr-McGee Corporation's petition for writ of certiorari.

Respectfully submitted,

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July 31, 1984

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No. 84-68

IN THE
Supreme Court of the United States

KERR-McGEE CORPORATION,

Petitioner,

VS.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

BRIEF OF AMICUS CURIAE

**CONOCO INC., ATLANTIC RICHFIELD COMPANY,
THE SUPERIOR OIL COMPANY, MARATHON OIL
COMPANY AND GETTY OIL COMPANY
IN SUPPORT OF REVERSAL**

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No. 84-68

IN THE
Supreme Court of the United States

KERR-MCGEE CORPORATION,

Petitioner,

VS.

THE NAVAJO TRIBE OF INDIANS, *et al.*

Respondents.

BRIEF OF AMICUS CURIAE

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THE SUPERIOR OIL COMPANY, MARATHON OIL
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OCTOBER TERM, 1984

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Respondents.

BRIEF OF AMICUS CURIAE

CONOCO INC., ATLANTIC RICHFIELD COMPANY,
THE SUPERIOR OIL COMPANY, MARATHON OIL
COMPANY AND GETTY OIL COMPANY

This amicus curiae brief is in support of the Petition of Kerr-McGee Corporation herein for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. All parties to this litigation through their counsel have given consent to the filing of this brief with the Court.

The companies named above support the reasons given by Petitioner for granting a writ of certiorari herein in Section I and II of its brief (pp. 10 and 12) and no repetition of such arguments is included herein. These points were also urged in the United States District Court for the District of Wyoming by said companies.

Of particular interest and concern to the above-named companies are the matters addressed in Section III of Kerr-McGee's brief (pp. 14 and 16). These are the serious and recurring problems raised by the Ninth Circuit decision concerning fundamental fairness and basic liberties on Indian reservations and

concerning the organization of and federal supervision over Tribal governments.

The Ninth Circuit decision, 731 F.2d 597, leaves oil and gas producers and ultimate consumers at the mercy of the governing body of the Tribes involved. No limit is placed upon the authority of the Tribe to tax, and there is to be no appeal, safeguard or recourse for those subject to the tax.

In *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982), the matter of the approval required by the Secretary of the Interior under the Constitution adopted by that Tribe was discussed, and the opinion pointed out that this was safeguard enough and that no other was necessary. The decision of the Ninth Circuit in the *Kerr-McGee* case gives to a Tribe which has chosen not to reorganize under the Indian Reorganization Act, 25 U.S.C. § 476, more power and authority than a Tribe which has reorganized under said Act.

The policy underlying the Indian Reorganization Act is to further Indian self government and Indian self sufficiency. If the Ninth Circuit decision is allowed to stand, this congressional policy will be in jeopardy, since there is no real incentive for a Tribe which has reorganized to continue as such.

A further policy of Congress is expressed in the Indian Leasing Act, 25 U.S.C. § 397, which gives the Secretary of the Interior authority to regulate leasing for oil and gas development on tribal reservations. This over-all policy was relied on by two United States District Courts in Arizona (No. CIV 80-247 PHX-WPC) and Utah (No. 79-0140) both involving the Navajo Tribe of Indians who had not reorganized and who had levied a tax on oil and gas production from their reservation. These lower courts found that un-reorganized Tribes must secure Secretarial approval for their tax in the same manner as a reorganized Tribe and based their decisions on a finding that congressional policy as expressed in the Indian Leasing Act gives the Secretary of the Interior authority to determine whether a given action of the

Tribes with respect to oil and gas development is in the best interests of the Tribe involved. There is no question that the Congress may establish policies to be followed in Indian activities.

In the case brought by the above-named companies in the United States District Court for the District of Wyoming, *Conoco Inc., et al. v. Shoshone and Arapahoe Tribes*, (No. C80-0181) the requirement of Secretarial approval was urged. The Secretary is a party to said action and it was also requested that he be ordered to promulgate regulations setting forth procedures to be followed in leading to his decision on Indian taxation, with an opportunity for comments from those proposed to be taxed. In this manner, fairness could be achieved. This position recognizes the power of the Tribes to tax oil and gas production as quasi-sovereigns, but asks for some safeguards upon such power. This to these companies seems reasonable and not burdensome upon the Tribes. Otherwise, there can be no assurance that if unrestricted power to tax is given to un-reorganized Tribes, such power will not be abused. The usual safeguards afforded to those proposed to be taxed in the United States do not exist in the case of Indian taxes. A system of safeguards, approved by the United States Supreme Court in the *Merrion* case, *supra*, as being adequate, provides bare minimal due process as to Tribes which have chosen not to reorganize.

Therefore, we respectfully submit that certiorari should be granted in the instant case in order that the Supreme Court may consider this important adjunct issue to the *Merrion* case, *supra*.

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CLERK

In The
Supreme Court of the United States
October Term, 1984

— o —
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versus

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Respondents.

— o —
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

— o —
RESPONDENTS' BRIEF IN OPPOSITION

— o —
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August 1984

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QUESTION PRESENTED

Are the tax laws of the Navajo Tribe of Indians rendered ineffective because the Secretary of the Interior has not acted affirmatively to approve them, where Congress has imposed no requirement of Secretarial approval, and the Secretary, on submission of the laws, determines that they do not require his approval?

PARTIES

Pursuant to Rule 40.3 of this Court, the persons listed by Petitioner as the director and members of the Navajo Tax Commission are substituted for as respondents herein by their successors, Lawrence White (director), Susan Williams, Stella Saunders, and Nelson Gorman (members).

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versus

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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Navajo Tribe of Indians is the largest federally-recognized Indian Tribe. It occupies an area of approxi-

mately 25,000 square miles (roughly the size of West Virginia), located within the States of Arizona, New Mexico, and Utah. The vast majority of this land is held in trust for the Tribe by the United States. The Navajo population of the reservation and environs is about 161,000.

The governing body of the Navajo Tribe is the Tribal Council, an 87-member body popularly elected every four years. The Tribal Council has existed in some form since the 1920's, and in much its present form since 1938. Out of the 161,000 population (close to half of which are minors), there are about 79,000 registered tribal voters, and of these 69% voted in the tribal general election of 1982.

Governmental programs operated by the Tribe include a police force, a system of courts, natural resources management and protection agencies, a labor relations agency, health and social welfare programs, and a system of public transportation. Governmental operations are financed in large part from the Tribe's general fund.

In 1978 the Tribal Council enacted two tax laws, the Possessory Interest Tax and the Business Activity Tax. The Possessory Interest Tax, 24 Navajo Tribal Code §201 *et seq.*, is based on the value of leasehold interests in tribal land. The tax rate has been set since 1978 at 3%. 24 N.T.C. §201. Possessory interests worth less than \$100,000 are not taxed. 24 N.T.C. §206.

The Business Activity Tax, 24 N.T.C. §401 *et seq.*, is measured by receipts from the sale of personal property produced or extracted within the Navajo Nation, or from

the sale of services within the Navajo Nation. Property produced within the Navajo Nation and then removed before sale is valued as of the time it leaves the jurisdiction. 24 N.T.C. §403(2). There are various exemptions and deductions, including a standard deduction of \$125,000 per calendar quarter. 24 N.T.C. §§405-406. The tax rate has been set since 1978 at 5%. 24 N.T.C. §401.

These two laws, like other Tribal Council resolutions, were submitted to the Bureau of Indian Affairs after passage, in order that they might be classified as to whether they required federal approval, and, if so, further acted upon. The Office of the Solicitor for the Department of the Interior reviewed the Possessory Interest Tax (the first passed), and expressly determined that it did not "purport to take any . . . action, which, under federal statute or regulation or under tribal law, is subject to Secretarial approval or disapproval." (Memorandum of May 4, 1978; Navajo Excerpt of Record on appeal at 148.) Both taxes were thereafter classified by the Department of the Interior as not requiring Secretarial approval. The Secretary has neither approved, disapproved, nor otherwise acted on either law, and has maintained the position in this and other litigation that the taxes do not require his approval in order to be valid.

Shortly after the enactment of these taxes, their validity was challenged in suits commenced against the Tribe in the federal district courts for Arizona, Utah and New Mexico. In 1980, after the Tenth Circuit upheld the taxing power of the Jicarilla Apache Tribe in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, *aff'd* 455 U.S. 130,

petitioner Kerr-McGee Corporation amended its complaint herein to add the United States as a party defendant, and to allege for the first time that the Navajo taxes were invalid because they required Secretarial approval. (The United States was never thereafter served with process, but participated as *amicus curiae* in the instant case, and as a party defendant in the parallel cases in Utah.)

In June 1982, the federal district court in Utah ruled in *Southland Royalty Co. v. Navajo Tribe*, No. 79-0140, and consolidated cases, that the tribal taxes required Secretarial approval to be effective (although they were otherwise found lawful). The district court in Arizona then reached the same decision in the instant case, relying on the *Southland* decision, which it held to have the effect of collaterally estopping the Tribe. Appeals and cross-appeals were taken to the Ninth and Tenth Circuits. On August 22, 1983, the Tenth Circuit reversed the district court's holding that the taxes required Secretarial approval, thereby upholding the validity of the taxes. *Southland Royalty Company v. Navajo Tribe*, 715 F.2d 486, petition for rehearing pending. On April 17, 1984, the Ninth Circuit did the same. It is this latter decision that petitioner seeks to have reviewed by this Court. The Navajo Tribe opposes that petition for the reasons set forth below.

—o—

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Follows Directly From The Decision Of This Court In Merrion v. Jicarilla Apache Tribe.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court left no doubt as to the power of Indian tribes to enforce taxes, within their territorial jurisdiction, as an element of their inherent sovereignty. Since the decision of the Tenth Circuit in *Merrion*, Petitioner and others have been attempting to carve an exception from the rule of that case in order to invalidate the tax laws of the Navajo Tribe. Although Petitioner claims to find this exception in the *Merrion* case itself, the principles enunciated by this Court in *Merrion* in fact defeat Petitioner's arguments and lead ineluctably to the conclusion that the Navajo taxes constitute a legitimate exercise of the Tribe's sovereignty.

Two principles are made very clear in the *Merrion* decision. One is that tribal taxing power is an "inherent power necessary to tribal self-government and territorial management," 455 U.S. at 141, and that as such it derives from a tribe's inherent sovereignty and *not* from any federal grant of power (whether by means of a federally-approved tribal constitution or otherwise). 455 U.S. at 149, n.14; 159. The other is that the taxing power, as an inherent attribute of sovereignty, remains intact unless divested by the federal government, and that this Court will not find divestiture of taxing power in the absence of "clear indications" that Congress intended such a result. 455 U.S. at 149 & n.14, 152, 159.

The foregoing principles suffice to dispose of Petitioner's arguments. This Court has previously recognized the sovereign powers of the Navajo Tribe. *United States*

v. Wheeler, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959).¹ The Navajo Tribe retains its taxing power,

¹*Amici curiae* Arizona Public Service Company ("APS") and Southern California Edison Company take an even more extreme position than Petitioner, claiming in their joint brief that the Navajo Tribal Council is not the government of the Tribe at all, but merely "an agency created . . . for the administrative convenience of the Department of the Interior." APS Brief at 16. The 55,000 Navajos who voted in the last tribal election would no doubt be taken aback by the claim that "the Ninth Circuit has taken it upon itself to appoint the Navajo Tribal Council as the tribal government by judicial fiat." *Id.* at 16. The underlying assumption of this argument, which would delegitimize the governments of any number of nations including England, and which, unsurprisingly, APS supports with no authority, is that a people (even one whose native language is unwritten) may establish a government only by means of a written constitution. The language of the IRA itself is to the contrary. See n. 2, *infra*.

The claim is in any case outside the scope of this litigation. It was not addressed by the Ninth Circuit because Kerr-McGee has never made the argument herein, and in fact alleged in its First Amended Complaint (the last), at ¶ 4, that the Navajo Tax Commission "is an agency of the Tribe created by the Tribal Council, which is the governing body of the Tribe." Although a claim similar to that now made by APS was argued in the District Court in Utah in the parallel *Southland* litigation, it was rejected on the grounds that "Although initially the Tribal Council was the creation of the Interior Department rather than the tribe, it is universally recognized as the existing, legally constituted governing body of the tribe, acting with all of the sovereignty of the tribe." Appendix to Petition for Writ of Certiorari, at C-13.

This is the only conceivable result. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court held that the Navajo Tribe, in enforcing the provisions of the Tribal Code through the tribal courts, exercises its separate and inherent sovereignty, and not that of the United States. Significantly, both the tribal courts and the Code were recognized by this Court to have been created by the Navajo Tribal Council. 435 U.S. at 327 & n.25. Rejecting the argument, now made by APS, that

(Continued on next page)

as a necessary aspect of such sovereignty, in the absence of clear federal divestiture, which has not occurred. It runs counter to the whole notion of tribal self-government to argue that because the Jicarilla Tribe has a constitution which required Secretarial approval of its tax laws, every other tribe must follow identical procedures.

Petitioner's arguments contort the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479, and the Navajo-Hopi Indian Rehabilitation Act, 25 U.S.C. §636, both of which were plainly intended to allow Indian tribes a range of choices as to the organization of their governments,

(Continued from previous page)

the Navajo government is no more than an arm of the federal government, this Court said, "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power." 435 U.S. at 328. The same is true as to the Interior Department, which while promulgating the original regulations as to the composition and selection of the Tribal Council, has never purported to dictate or even to enumerate its powers.

Both Congress and the Executive Branch have long recognized the Navajo Tribal Council as the government of the Navajo Tribe. "Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts." *Williams v. Lee*, 358 U.S. 217, 221 (1959). The Navajo and Hopi Indian Rehabilitation Act itself manifests Congressional recognition of the Tribal Council. 25 U.S.C. §§ 635(b), 636, 637, 638. See 16 U.S.C. § 445; Pub. L. 93-351, Act of Dec. 22, 1974, 88 Stat. 712; Pub. L. 83-493, Act of October 27, 1974, 88 Stat. 1486; Pub. L. 86-636, Act of July 12, 1960, 74 Stat. 470; Pub. L. 85-868, Act of Sept. 2, 1958, 72 Stat. 1686-1690; Pub. L. 85-547, Act of July 22, 1958, 72 Stat. 402; Pub. L. 84-276, Act of Aug. 9, 1955, 70 Stat. 522; S. Rep. 93-1177 on H.R. 10337; Rev. Proc. 83-87, Dec. 12, 1983, 1983-50 I.R.B. 8. See also *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962), cert. denied 372 U.S. 908 (1963); Robert W. Young, *The Navajo Yearbook*, at 392 (1961). For codification of laws concerning the Tribal Council, see 2 N.T.C. § 101 et seq.; Navajo Election Law of 1966, 11 N.T.C. § 1 et seq.

rather than to compel any particular result.² Both acts make the adoption of a constitution entirely optional, and both acknowledge the existing powers of Indian Tribes by providing that tribal constitutions might vest in the tribes adopting them certain powers *in addition to* those already vested in them by existing law. 25 U.S.C. §§476, 636; *see United States v. Wheeler*, 435 U.S. 313, 328 (1978). *Mer- rion* stands for the proposition that one of those powers

²The IRA does not even equate organization with the adoption of a constitution, as Petitioner suggests; it provides that Indian tribes *shall* have the right to organize and *may* adopt constitutions and by-laws. 25 U.S.C. § 476. It also flatly provides that the Act "shall not apply" on reservations where its application is voted down. 25 U.S.C. § 478.

Legislative history further bears out that there was no intention to force tribes into any particular course. The sponsor of the IRA and others repeatedly stated that nothing in it permitted that BIA to impose its will upon any Indians, and that its provisions were entirely optional. 78 Cong.Rec. 11123-11124, 12164 (June 1934). (Arizona Public Service Company relies in its *amicus curiae* brief on comments which Commissioner Collier made to the Navajo Tribal Council concerning the bill then pending in Congress. APS Brief at 8 et seq. What APS does not say is that due to tremendous opposition to the BIA-drafted bill originally presented by Commissioner Collier, the IRA was extensively redrafted before passage, specifically so as to make its provisions permissive instead of mandatory. *Id.* at 11123-5, 12164. While Commissioner Collier, in order to obtain support for the IRA, painted for the Navajos a picture of tribes "at the mercy of the Secretary", no matter how "arbitrary" or "devilish" his whims, APS Brief at 8, it cannot seriously be contended that that is the law today, and the wording as well as the legislative history of the IRA indicates that Congress did not accept it to be the law then.) As for the Navajo and Hopi Indian Rehabilitation Act, the Secretary of the Interior noted when transmitting the bill to Congress that the provision relating to a constitution for the Navajo Tribe "has been revised in order to accord the Navajos the widest practicable choice in determining the framework of their tribal government." H.R.Rep. 81-1474.

which pre-existed the IRA, as opposed to having been created by tribal constitutions, is the taxing power. *See also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

There is simply nothing in these laws or any other legislation which would accomplish the result Petitioner argues for—that Congress has limited the taxing power of tribes without constitutions, or that all tribal tax laws require Secretarial approval, even in the absence of constitutional provisions to that effect. Contrary to Petitioner's suggestion, the Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g, does not so much as hint at such a meaning. Far from indicating some Congressional intention to generate distinctions between tribes with constitutions and those without, the Act applies generally to "unallotted lands within any Indian reservation or reservations," permitting them to be leased for ten years and as long thereafter as minerals are produced in paying quantities, by authority of "the tribal council or other authorized spokesman for such Indians," and with the approval of the Secretary. 25 U.S.C. §396a.

Petitioner's arguments notwithstanding, the proviso in the Mineral Leasing Act (§396) does not distinguish tribes which have simply organized under the IRA from other tribes. Tribes which have both organized *and* incorporated under the IRA (which are separate matters) are distinguished only to the extent that it is provided that the auction requirements of 25 U.S.C. §396b shall not restrict their rights to lease their land as permitted under the IRA. This is a reference to the fact that under 25

U.S.C. §477, tribal corporations may be empowered to lease lands independent of the Secretary for a period not to exceed ten years (not, however, for the longer period of most mineral leases).

The very specificity of this provision belies Petitioner's arguments that Congress intended to create additional distinctions between tribes with and without constitutions, limiting the taxing power of the latter. Indeed, there is nothing whatever about taxes in the Mineral Leasing Act. Petitioner suggests that by explicitly requiring the Secretary to approve the terms of tribal mineral leases, Congress has implicitly required approval of any tribal laws bearing on the lessees. This argument reflects the very confusion of proprietary and sovereign matters which this Court rejected in *Merrion*, and attempts to turn a law obviously intended to protect Indian tribes into an unwarranted limitation on their powers. In *Merrion* this Court held that a law specifically authorizing state taxation, 25 U.S.C. §398a-398c, did not thereby limit tribal taxing power; *a fortiori* the 1938 Act, which does not even mention taxes, does not do so. 455 U.S. at 150-151.

Petitioner's analysis of the *Merrion* decision depends entirely on the reading of isolated passages out of context. The passage about "federal checkpoints," 455 U.S. at 155, is part of this Court's analysis of the Commerce Clause issue in *Merrion*. The existence of such checkpoints for the tax at issue there was relevant because it obviated the need for additional analysis by the Court under the dormant Commerce Clause. *Id.* The absence of federal checkpoints might have altered the Commerce Clause analysis (although this Court went on to hold that the

tax at issue would not infringe the dormant Commerce Clause in any case), but that is entirely different from the proposition that, independent of any Commerce Clause question, a tribal tax must pass through federal checkpoints to be valid. As for the statement that the amendment of the tribal constitution was necessary to effectuate the Jicarilla tax, that can hardly have been intended to suggest such a requirement for all tribes; even among those tribes which *have* constitutions, it is obvious that an amendment is not necessarily required in order to permit taxation.

Finally, the mere mention that the constraints inherent in Secretarial approval and federal ability to take away tribal taxing power "minimize potential concerns" about unprincipled tribal taxes cannot reasonably be read as signifying a judicially-created requirement for Secretarial approval. The Navajo taxing power too is constrained in that it may be divested by Congress, but Petitioner's interpretation of this remark—that whether Congress acts or not, every exercise of tribal taxing power is automatically conditioned on Secretarial approval—is wholly at odds with the statement immediately preceding, that tribal authority to tax is an "inherent power." 455 U.S. at 141.

The result Petitioner argues for would, moreover, constitute an extraordinary instance of judicial legislation. As the Ninth Circuit noted in its decision of this case, even a tribe which has a constitution does not necessarily require Secretarial approval of tax laws; this is something that varies from one tribe to the next, and is answerable by reference to the tribal constitution itself. (This Court for example specifically recognized in *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 66 [1978], that there are tribal constitutions which do not require Secretarial approval of ordinances.) Onto this system Petitioner would engraft a new, judicially-created category, wherein Secretarial approval of ordinances is required notwithstanding the lack of any express requirement therefor in federal or tribal law. Petitioner's analysis suggests no principled method for determining exactly what tribal laws would fall into this new category. The Ninth Circuit was entirely correct in rejecting a result which would not only result in enormous confusion, but would conflict head-on with the right of Indian tribes to select their own form of government and to exercise their sovereign powers, subject only to divestiture by Congress.

II. The Decision Of The Ninth Circuit Is In Accord With The Decisions Of The Tenth Circuit And Other Federal Courts; There Is No Conflict For This Court To Resolve.

There have been a number of cases raising virtually the same question decided by the Ninth Circuit in the instant case. The outcome of all of these has been to uphold the validity of the tribal laws challenged.

Most directly on point, of course, is the decision of the Tenth Circuit in *Southland Royalty Company v. Navajo Indian Tribe*, 715 F.2d 486 (1983), *petition for rehearing pending*. The taxes at issue there were the same Navajo taxes challenged here. The Tenth Circuit, like the Ninth, found the taxes valid without Secretarial approval, and without the adoption of a constitution by the Navajo Tribe. Among the statements from *Southland* which the Ninth Circuit quoted with approval in its decision herein is that "One of the ways in which the IRA reflects a respect for

self-government is in the provision that makes adoption of a constitution optional." 715 F.2d at 489. For this and other reasons, the Tenth Circuit rejected the argument that when this Court in *Merrion* found the Mineral Leasing Act of 1938 not to pre-empt tribal taxing power, that holding was limited to tribes with constitutions. The Court of Appeals in *Southland* also noted that when Congress recognized tribal taxation in the Natural Gas Policy Act of 1978, 15 U.S.C. §3320 (which recognition was relied on by this Court in *Merrion*), it in no way distinguished between tribes with and without constitutions. *Id.*

A case dealing with these same issues in the context of the tax laws of another tribe is *Conoco v. Shoshone and Arapahoe Tribes*, 569 F.Supp. 801 (D. Mont. 1983), *appeal pending*. There again it was argued that the holding of *Merrion* was inapplicable to the Shoshone and Arapahoe Tribes because they did not have an IRA constitution and had not had their taxes approved by the Secretary. The court rejected this argument in a detailed analysis. (It is worth noting that although this decision was released nine days after that of the Tenth Circuit in *Southland*, the court in its opinion indicated that it had reached its result before the Court of Appeals ruling issued. 569 F.Supp. at 804.) The court found that Congressional power to divest tribes of their taxing authority, the Indian Civil Rights Act (25 U.S.C. §1301), and economic and political restraints constituted adequate protection from arbitrary and confiscatory taxation. 569 F.Supp. at 806. It also rejected the argument that its holding suggested there was no good reason for a tribe to reorganize under the IRA, by pointing out that there were other benefits, not how-

ever related to taxing power, which were available to tribes which did so. *Id.* at 807.³

Another case on point is *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied* 52 U.S.L.W. 3720 (1984). Although the *Babbitt Ford* case did not involve tax laws, in it the argument was again made—and again rejected—that the Navajo Tribe could enforce its civil laws as to non-Indians only if it adopted a constitution and had those laws approved by the Secretary. 710 F.2d at 598-599. Similarly, in *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), the court upheld the application to non-Indians of a tribal zoning ordinance which had not been approved by the Secretary, on the grounds that there, as here, “The executive branch expressly advised the Tribes that the ordinance could be enacted without BIA approval.” 670 F.2d at 903.

The various courts which have considered the arguments made by Petitioner herein have rejected them. These arguments do not merit review by this Court.

³The arguments of Petitioner and *amici curiae* that, if the Navajo Tribe may tax without secretarial approval, other tribes which organized under the IRA must have been “duped” into surrendering their powers, again ignores the fact that adopting a constitution does not necessarily mean conditioning the effectiveness of tribal laws on Secretarial approval. See discussion at pp. 11-12, *supra*. Whether Secretarial approval is required turns not on whether a tribe adopts a constitution, but on the specific provisions of the constitution or of other applicable tribal or federal law. Moreover, for a given tribe whose government was in disarray because of the federal allotment policy repudiated in the IRA, or where there were disputes as to who governed the tribe, a constitution was no doubt an extremely useful tool—though not necessarily the only one—for resolving the confusion and starting the tribe out on a new foot. It does not however follow that a governing body could not evolve without a written constitution, as did the Navajo Tribal Council.

III. There Are No “Serious And Recurring Problems” Raised By The Decision Below.

Petitioner and the various *amici curiae* greatly exaggerate what is at issue in this case, raising the specter of Indian tribes completely out of control of the federal government. It bears emphasis that this is not a case of Secretarial *disapproval* of an ordinance, and that the Navajo Tribe has in no way attempted to circumvent any authority delegated to the Secretary. The Tribe submitted its tax laws to the Secretary, and the Secretary determined them not to require his action. It is difficult in the extreme to see why that determination should deprive the Navajo Tribe of its taxing power.

It is of some interest that in January of 1983 the Assistant Secretary for Indian Affairs issued “Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities.” Consistent with the position of the Interior Department in this litigation, the guidelines apply, by their terms, only “where Secretarial review or approval is expressly required under federal law, the constitution of the tribe, the ordinance itself, or other tribal law.” Guidelines, §1.1B. The procedures set out in the guidelines are therefore inapplicable to the Navajo tax laws, and in any case the Navajo taxes, like the Jicarilla Apaches’, were enacted before the guidelines issued. But it may be noted that the only *substantive* reasons for which taxes subject to review may be disapproved by the Secretary under the guidelines are violations of federal or tribal law, or failure to provide a procedure “by which a taxpayer may contest his or her tax liability, and be afforded a right to a hearing before a tribal forum other than the body which enacted the tax.” Guidelines §1.6B(3)-(4).

Protracted litigation in two federal circuits has not shown the Navajo taxes to violate any law, and the tax laws do provide an appeal procedure of the type required. 24 N.T.C. §§220, 427. And while lack of taxing power in the tribe's governing body is also grounds for disapproval, the guidelines provide that "Unless their powers are specifically limited by the tribal documents which established them, the governing bodies of tribes without written constitutions will be considered to possess the authority to exercise the inherent power of the tribe to tax." Guidelines, §1.6B(2)(b). With the Navajo taxes already in harmony with the substantive guidance the Secretary has provided, Petitioner's insistence on the urgent need for this Court to require Secretarial review rings especially hollow.

The crucial factor ignored by Petitioner and the *amici curiae*, when they claim that the Ninth Circuit has placed the Navajo Tribe beyond federal control, is the plenary power of Congress over Indian tribes. Congress has ample power to deal with any threats which particular tribal taxes may pose to national interests. By the same token, "a proper respect for the plenary authority of Congress in this area" cautions that the courts themselves "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1980).

To date, forty-eight years after the deadline for tribes to vote whether to come within the application of the IRA, Congress has not seen fit to limit the exercise of tribal sovereignty in the manner sought by Petitioner. It did in 1968 enact the Indian Civil Rights Act, 25 U.S.C. §1301,

which provides individuals with much the same protections against Indian tribes as the Bill of Rights ensures against the states and the federal government. Congress thus ensured that all Indian tribes, regardless of whether they do or do not have constitutions and regardless of what those constitutions may provide, are subject to enumerated constraints in their dealings with persons under their jurisdiction. Congress apparently saw no need to go any further in limiting the powers of tribes without constitutions, whether by removing certain powers from them or requiring that all their laws be approved by the Secretary of the Interior.

Contrary to Petitioner's assertion that the protections of the Indian Civil Rights Act are "incapable of enforcement," this Court held in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), that the Act "modifies the substantive law" applicable to Indian tribes, and that claims for violation of the Act may be heard in tribal courts. This route has not been attempted by any of those challenging the tribal taxes in federal court, and any complaints about the Indian Civil Rights Act being unenforceable are therefore unfounded.⁴ (Claims that the Navajo taxes violate

⁴Also ungrounded are complaints about sanctions for failure to comply with certain requirements of the tax laws—none of which have been imposed on Petitioner or anyone else. With respect to the loss of rights to engage in productive activity, it may however be noted that the availability of such a sanction is in accordance both with the practice of states which enjoin delinquent taxpayers from continuing in business (see e.g. New Mexico Statutes [1978 compilation] § 7-1-53, Arizona Revised Statutes § 42-1334), and with the holding of this Court in *Merrion*, 455 U.S. at 144-145, that Indian tribes retain the pow-

the Indian Civil Rights Act were in any case considered by the district court in *Southland*; the court found no cause of action stated even assuming it had jurisdiction. Appendix to Petition for Writ of Certiorari at C-9, C-10.) Furthermore, contrary to assertions that only Indians can participate in tribal government, Petitioner and a number of the *amici curiae* have commented on regulations proposed by the Navajo Tax Commission, in writing or at hearings before the Commission. There is in fact nothing to prevent these companies from advocating their views with tribal lawmakers in the same way as they do with respect to other governments. The lack of suffrage can be no impediment, as corporations are no more able to vote in state or federal elections than in tribal ones.

The many cases which Petitioner cites to show "serious and recurring problems" in fact demonstrate the opposite; they are all in harmony in upholding the civil jurisdiction of Indian tribes, in accordance with the decisions of this Court in *Merrion* and other cases. See, e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The decision of the Ninth Circuit herein simply does the same.

(Continued from previous page)

er to exclude from their jurisdiction those who do not comply with conditions on their presence. The Tribe notes as well that for an Indian tribe to impose only civil sanctions on the commission, by a non-Indian, of an act which is punishable as a crime when committed by an Indian, is no more than what the tribe is required to do by the holding of this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

CONCLUSION

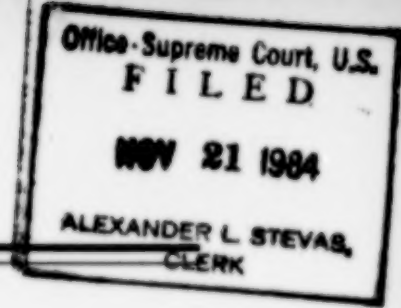
The issues raised by Petitioner are all settled ones. There is nothing in the decision of the Ninth Circuit which warrants review by this Court.

Respectfully submitted,

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(8)
No. 84-68



**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 1984

KERR-McGEE CORPORATION,
Petitioner,
v.
NAVAJO TRIBE OF INDIANS,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
PEABODY COAL COMPANY**

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PEABODY COAL COMPANY

Peabody Coal Company respectfully submits this brief as amicus curiae in support of the position of petitioner Kerr-McGee Corporation. Counsel for petitioner and respondent have given their written consent for the filing of this brief. Such written consent has been filed with the Court.

INTEREST OF AMICUS CURIAE

Peabody Coal Company (hereafter referred to as Peabody), is a successor in interest under various Leases with both the Navajo and Hopi Tribes. Peabody obtained the right to mine coal from portions of the Navajo Indian Reservation in Arizona, including mining areas within the joint use area of both the Navajo and Hopi Tribes by Assignments of certain Leases approved in 1968. Over the years it has been mining coal on the Reservation, Peabody has paid approximately \$35,000,000 in advance and production royalties.

Peabody is the beneficiary of a contractual arrangement between the Navajo Tribe and the Salt River Project Agricultural Improvement and Power District as managing agent of the Navajo Project. The Navajo Tribe had agreed not to tax the Navajo Project owners and Peabody Coal Company as part of the contractual arrangement. With that agreement now in doubt, the extensive investment by Peabody on the Reservation¹ could be irreparably impaired by the unregulated and unfettered exercise of the power of taxation by the Navajo Tribe in an essential industry such as coal production.

As coal production has gained momentum as a significant energy resource, and given the extensive federal involvement and regulation in the industry, Peabody, both for itself and others including ultimate consumers of energy, has an essential interest in this case arising out of the havoc unsupervised exaction of taxes by the Tribe can create.

STATUTORY PROVISION INVOLVED

1. United States Code Annotated, Title 25, §640d-6:

Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, oil, gas, and all other minerals within or underlying such lands.

¹ For State of Arizona ad valorem property tax purposes, the full cash value for the Kayenta and Black Mesa mines of Peabody have totalled approximately \$100,000,000.

All such coal, oil, gas, and other minerals within or underlying such lands shall be managed jointly by the two tribes, subject to supervision and approval by the Secretary as otherwise required by law, and the proceeds therefrom shall be divided between the tribes, share and share alike.

SUMMARY OF ARGUMENT

The Navajo Tribe is a domestic dependent nation or a quasi-sovereign. With such status, the Tribe is faced with limits on the exercise of its powers. One such a limitation must be the establishment of boundaries on the Tribe's power to tax. Far from being a matter related to the right to govern itself, or the exercise of power over members and its territory, the attempted exercise by the Navajo Tribe of the power to tax is an effort to create the equivalent of long-arm jurisdiction reaching out far beyond Reservation boundaries.

The absence of federal supervision over tribal taxing power leaves Peabody without a remedy. With rights for the non-Indian having been stripped away one by one, the exercise of federal supervision is essential to the orderly administration of the Navajo Tribe's proposed taxes. This is particularly so in this case, for the Navajo Tribe's proposed taxes transcend internal affairs and reach out with external impact beyond the Reservation.

ARGUMENT

I. TRIBES ARE NOT INDEPENDENT SOVEREIGN ENTITIES ENTITLED TO EXERCISE POWERS ATTRIBUTABLE TO INDEPENDENT NATIONS.

A tribal government characteristic that must be recognized as Indian law jurisprudence develops is that tribes are something less than independent sovereign entities. The exercise of power by an entity that is less than an independent sovereign must necessarily be of a limited nature. The power of a tribe cannot be the equivalent of an independent sovereign nation.

One striking example of the limited nature of tribal sovereignty is found in *United States of America v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940), wherein it was determined that a tribe did not possess the power to waive its own sovereign immunity. Thus, as stated in *United States v. Wheeler*, 435 U.S. 313 (1978), the sovereignty retained by tribes is both of a unique and limited character. "Unique" does not have to mean extensive and completely independent. Rather, the unique nature of the sovereignty is its limited character. This Court in *Wheeler* cited F. Cohen, *Handbook of Federal Indian Law*, 122 (1945), for the view that tribes no longer possess the full attributes of sovereignty. Limited sovereignty correlates with limited power or limitations upon the exercise of power.

Over the years, tribes have been characterized as domestic dependent nations, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 at 144 (1982), or as quasi-sovereign entities, *United States v. United States Fidelity and Guaranty Company*, *supra*, occupying a semi-independent position. *U.S. v. Kagama*, 118 U.S. 375 (1886). It naturally follows that there are limitations on the exercise of powers of sovereignty by a tribe.

As an example of such a limitation, the Jicarilla Apache Tribe was permitted, with Secretary of Interior approval, to impose a severance tax on non-members of the Tribe doing business on the Reservation. *Merrion v. Jicarilla Apache Tribe*, *supra*. While this was determined in the context of an Indian Reorganization Act Tribe, a limit imposed on the exercise of tribal sovereignty as to the power to tax was recognized by this Court in stating in the *Merrion* case in 455 U.S. at 141 as follows:

"Of course, the Tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on non-members can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax

in an unfair or unprincipled manner, and insure that any exercise of the tribal power to tax will be consistent with national policies."

Indian tribes have never been construed as independent sovereign nations. While they are unique quasi-sovereigns, such "uniqueness" bears with it limitations on the exercise of power. Dependent or quasi-sovereign nations which cannot waive their own sovereignty must have limitations on the powers they can exercise over non-members. One such limitation as found in *Merrion* in the context of an Indian Reorganization Act Tribe is the requirement for Secretarial approval over the exercise of a right so potentially significant as the power to tax. A non-Indian Reorganization Act Tribe such as the Navajo Tribe is no less unique. Its exercise of power is no less limited. The Navajo Tribe is no less a domestic dependent quasi-sovereign than the Jicarilla Apache Tribe.

II. WITH THE EROSION AWAY OF REMEDIES FOR NON-MEMBERS OF INDIAN TRIBES, AND WITH THE PREEXISTING EXTENT OF FEDERAL INVOLVEMENT, IT IS ESSENTIAL THAT THERE BE FEDERAL SUPERVISION AS TO THE TRIBE'S EXERCISE OF THE POWER TO TAX.

There has been significant shrinkage in remedies available to non-Indians who deal with tribes. First, a non-Indian encounters a tribe's sovereign immunity defense, a defense a tribe cannot itself waive. Next, Indian governments have been found free of the restraints attributable to federal and state governments imposed by the Bill of Rights and the Constitution. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). Then, after the enactment of the Indian Civil Rights Act, 25 U.S.C. §§1301 *et seq.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), removed any meaningful remedies available to non-Tribal members under that legislation. The result is that preexisting business relationships are now subject to the concept that businesses have no rights on the Reservation.

The prevailing situation is that businesses have been reduced to doing business with a tribe at their own risk. The sole stopgap in this development is Secretarial review.

The need for Secretarial approval can be demonstrated with a single and simple example. If it is assumed that a tribal tax is confiscatory or discriminatory, without Secretarial approval, Peabody would have no claim under the United States Constitution. Likewise, Peabody would have no claim under the Indian Civil Rights Act. Finally, Peabody would have no contract claim against the Tribe given its established sovereign immunity.² Absent Secretarial review and approval, Peabody would be left at the whim and caprice of a domestic dependent quasi-sovereign nation that has sovereign immunity. Absent Secretarial review and approval, Peabody would be without a remedy. Absent Secretarial review and approval, Peabody would have a lease under which it would have no rights it could enforce.

The need for Secretarial approval is emphasized by other salient points. Peabody's mines are within the joint use area for the Navajo and Hopi Tribes. In 25 U.S.C. §640d-6, Congress provided that partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal and other minerals within such lands. This statutory provision further provided that the coal and other minerals within the joint use area must be managed jointly by the Hopi and Navajo Tribes subject to supervision and approval by the Secretary and that the proceeds therefrom must be divided between the Tribes, share and share alike. With the powers proposed by the Navajo Tribe in its taxing schemes to exclude an entity such as Peabody from the Reservation, intervention by the Secretary is essential. There is an obvious potential conflict with the Hopi Tribe under the joint management provisions of 25 U.S.C. §640d-

² This example does not even take into account the related problem of the United States being a necessary party to litigation involving a tribe and the consent of the United States to be sued to avoid its sovereign immunity defense.

6. Without the general supervision of the Secretary, unilateral acts by the Navajo Tribe such as the adoption of its proposed taxation scheme could obliterate the orderly joint management of resources on the Reservation within the joint use area. Similarly if the Navajo Tribe could act unilaterally in adopting a taxing scheme, that could provide the Hopi Tribe with motivation to "out-tax" the Navajo Tribe. The conflict as to the joint use area could then only accelerate. Secretarial review and approval of taxing schemes would avoid these potential problems and be harmonious with the intent of 25 U.S.C. §640d-6.

Aside from the federal involvement in the joint use aspect of the relationship between Peabody and the Navajo Tribe, the Secretary of Interior, of course, initially approved Peabody's leases. Since then, Federal involvement in Peabody's coal mining operations has been far-reaching and extensive. Without listing each element, the government has legislated in such wide-ranging areas as The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§801 *et seq.*, to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201 *et seq.* With the existing extent of federal involvement, it naturally follows that there should be Secretarial review and approval as to the Navajo Tribe's tax scheme, particularly when such taxes impact beyond Reservation boundaries.

The Navajo Tribe's proposed taxing scheme not only creates conflicts within Reservation boundaries, but the Tribe's tax also extends its jurisdiction beyond the Reservation. Indian Tribes possess attributes of sovereignty over their members and their territory. *United States v. Mazurie*, 419 U.S. 544 (1975). As stated in the *Mazurie* case, the power of a tribe is to regulate its internal and social relations. The proposed tax scheme by the Navajo Tribe constitutes an

exercise of power beyond the borders of its Reservation and beyond the Tribe's internal affairs.³

The Tribe therefore knows no limitation in the attempted exercise of its power to tax. To maintain order, effective development of resources, and to avoid conflicts both within and without the Reservation, a supervisory role is essential. With the erosion of remedies for taxpayers reduced to the non-existent, it is essential that Secretarial supervision and approval exist as a predicate to the validity of any taxing scheme.

III. CONCLUSION.

The Navajo Tribe is not an independent sovereign nation. It is unique and more restricted. It has less pervasive power than an independent nation. As a domestic dependent and quasi-sovereign entity, there are limits on its unfettered exercise of power. One of those limitations is the necessity for Secretarial approval of the enactment of tribal tax statutes and regulations.

Absent Secretarial review and approval, non-tribal members are remediless. Review and approval by the Secretary is essential to assure the absence of conflict within Reservation boundaries. Review and approval by the Secretary is essential to avoid the overzealous and overreaching exercise of

³ Among other taxable events, the Navajo Tribe seeks to exact taxes for sales that take place off the Reservation. Under the Tribe's scheme, if Peabody were to sell coal to a foreign country, the Tribe would claim entitlement to tax the proceeds of that sale. In short by way of such example, the Tribe would be extending its reach as a quasi-sovereign, domestic dependent nation to international relationships and contracts. This example further underscores the necessity for Secretarial review and approval.

jurisdiction by the Navajo Tribe and to prevent its exercise of quasi-sovereignty beyond internal relations, Reservation borders, and members. It is respectfully requested that the Ninth Circuit be reversed.

Respectfully submitted,

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**IN THE
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October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
IN SUPPORT OF THE PETITIONER**

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Petitioner,

versus
THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
IN SUPPORT OF THE PETITIONER**

**INTERESTS OF THE AMICUS CURIAE
AND INTRODUCTION**

The amicus curiae 'Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is the operating agent of the Navajo Project, a coal-fired electric generating plant and attendant facilities, located on the Navajo Indian reservation in Arizona. The Navajo Project is co-owned by the amicus, the City of Los Angeles, Arizona Public Service Company, Ne-

vada Power Company and Tucson Electric Power Company.¹

The amicus is also the operating agent of the Coronado Generating Station, a coal-fired electric generating plant located off the Navajo reservation. It is co-owned by the amicus and the City of Los Angeles.

The plants are fueled in substantial part by on-reservation coal resources mined by the Peabody Coal Company, and the Pittsburgh & Midway Coal Co., respectively. To the extent that the Navajo Tribe can tax these fuel suppliers,² certain taxes would be passed along to the plants' owners under their coal supply contracts. The owners and their customers in Arizona, California, and Nevada can be directly affected by the outcome in this case.

The amicus urges this Court to reverse the judgment of the Court of Appeals because the opinion of the court below ignored the important role Secretarial approval plays as the only remaining check against unlawful tribal conduct and otherwise unrestrained tribal exercise of civil regulatory jurisdiction over nonmembers.

SUMMARY OF ARGUMENT

Departing from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court upheld the power of an Indian tribe to tax a non-Indian in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Critical to this Court's holding, and in response to the dissenting justices' now prophetic warning, this Court required Secretarial approval "before any tax on nonmembers can take effect." 455 U.S. at 141.

¹ The amicus holds title to 24.3% of the Navajo Project for the use and benefit of the United States.

² By contract, the Navajo Tribe has promised not to tax the owners and Peabody Coal Company in connection with the Navajo Project. The Tribe has twice repudiated this promise, as detailed below. No such promise has been made to Pittsburgh & Midway Coal Co. in connection with the Coronado plant.

The Ninth Circuit has now abandoned this critical precondition to a tribe's power to tax. Thus, non-Indians have no protection at all. If *Merrion* is to survive, this Court must reverse the Ninth Circuit because Secretarial approval of tribal taxing ordinances is a necessary incident of federal Indian law generally, and the Navajo treaty in particular.

ARGUMENT

I.

THE ODYSSEY OF AMERICAN INDIAN LAW

In 1868, Lieutenant General William T. Sherman, of Civil War fame, concluded a treaty of peace with the Navajo Tribe of Indians. II C. Kappler, *Indian Affairs, Laws and Treaties* 1015 (1904). Since then, this Court has charted a course in American Indian law marked by many changes of fortune. Just as the long wanderings of Odysseus were affected by changing winds, tides, and currents, this Court's development of American Indian law has been affected by historical change, currents of public opinion, and contemporary fact.³ Adjusting the competing demands of an indigenous people with those of a new nation has not been easy. Sometimes the lower courts stay the course too long until corrected by this Court. Sometimes they stray from this Court's course prematurely, as when the United States Court of Appeals for the Ninth Circuit held that the Navajo Tribe could tax non-Indians even without the approval of the Secretary of the Interior. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984).

Departing from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court decided the important question of tribal taxing power over non-Indians in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Over objections that (1) non-Indians had no right to participate in tribal

³ See *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962) for Justice Frankfurter's observation that notions of tribal status yield "to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations."

government, (2) federal claims could be adjudicated in tribal forums without possibility of federal judicial review at any point, and (3) tribal taxing power was not limited by constitutional or statutory constraint, this Court nonetheless upheld the power of Indian tribes to tax non-Indians. The dissenting opinion of Justice Stevens, along with the Chief Justice and Justice Rehnquist, stated with great force the genuine dangers to civil liberties created by an acknowledgment of a tribal power to tax non-Indians. This Court's answer to the dissent's recognition of these dangers was as follows:

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and *the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect*. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

455 U.S. at 141 (emphasis added).

The dissent characterized the Secretary's power to veto a tribal tax as a poor substitute for the "protection afforded by rules of law." 455 U.S. at 190. Now the Ninth Circuit has abandoned even this poor substitute by refusing to follow *Merrion*. The reality of unfair and unprincipled tribal taxation is illustrated by the experience of the owners of the Navajo Project with the Navajo and Hopi Indian Tribes.

The Navajo Tribe expressly promised that it would not tax them or their coal supplier. This promise is contained in the lease under which the owners operate the Navajo Project electric generating plant. And yet soon after the completion of the \$611,000,000.00 project, the Tribe enacted the taxes which are before this Court and sought to apply them to the owners. The owners resisted these taxes in the United States District Court for the District of Arizona and in the United States Court of Appeals for the Ninth Circuit where, after

full briefing and oral argument, the Tribe mooted the appeal in 1981 by reaffirming its covenant not to tax.

In the fall of 1984, however, and even *after* this Court granted certiorari in this case, the Navajo Tribe again repudiated its covenants not to tax the amicus and its co-owners. As this brief is being written, the amicus faces the specter of repeating the long and arduous task of resisting Navajo tribal taxation.

The Hopi Indian Tribe enacted a coal severance tax on coal mined on lands off its reservation, and thus beyond its clear jurisdiction. The plants' owners and others appealed to the Secretary from the enactment of this tax through the administrative mechanism provided by the Hopi's Indian Reorganization Act constitution and federal regulations. The Secretary of the Interior vetoed the Hopi tax as being in violation of federal law, thus proving the wisdom of this Court's requirement that before a tribe can tax it must obtain the approval of the Secretary.

After this Court's decision in *Merrion*, only Secretarial review stands between non-Indians and unlawful tribal power. Non-Indians neither vote nor participate in tribal government. And, after *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), non-Indians have no opportunity to present their Indian Civil Rights Act claims to a federal forum. State forums have no jurisdiction. A tribal forum is no forum at all because (1) due process is absent, (2) Indian tribes do not recognize the doctrine of separation of powers,⁴ and (3) there is no federal judicial review of federal questions decided by tribal forums.

All that stands between this sorry state of affairs and non-Indians is the minimal protection this Court provided when it stated that tribes *must* obtain the approval of the Secretary before any tax on nonmembers can take effect. And yet

⁴ Indeed, when a Navajo court entered a decision adverse to the Tribe, the Council immediately enacted an ordinance subjecting "judicial" decisions to further review by the Council itself. Resolution of the Navajo Tribal Council Reorganizing the Navajo Judicial System, No. CMY-39-78, dated May 4, 1978.

the Ninth Circuit has eliminated even this, at best, marginal substitute for the protection afforded by rules of law.

II.

THE NINTH CIRCUIT'S REJECTION OF SECRETARIAL APPROVAL

How was the Ninth Circuit able to slip out from under the seemingly mandatory requirement of this Court that Secretarial approval of taxing ordinances will ensure against the "concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner?" 455 U.S. at 141. It did this because no federal statute expressly requires Secretarial approval before the imposition of a tribal tax. The Ninth Circuit held that Secretarial approval was required "only of those tribes that have chosen to include such a requirement in their constitutions, by-laws, or charters." 731 F.2d at 604. In a very real way, the Ninth Circuit has stripped this Court's answer to the genuine concern expressed by the dissenting Justices in *Merrion*.

A six-member majority of this Court was willing to uphold tribal taxation of non-Indians because they were persuaded that Secretarial review would protect non-Indians from the dangers exposed by the three-member dissent. The Court now has two choices: (1) it can reverse *Merrion* as a decision resting on a fundamental misapprehension of the existence of Secretarial protection; or, (2) it can hold that because Secretarial approval of tribal taxing ordinances is a necessary implication of the Congressional scheme for Indian tribes and a necessary incident of their dependent status, the failure of the Navajo Tribe to adopt Congressionally imposed conditions deprives it of the power to tax petitioner.

We do not re-argue *Merrion* here. The dissenting opinion shows the way. We do chart the course for a finding that Secretarial approval of tribal taxing ordinances is a necessary incident of federal Indian law generally, and the Navajo treaty itself.

III.

SECRETARIAL APPROVAL OF TRIBAL TAXING ORDINANCES IS A NECESSARY INCIDENT OF FEDERAL INDIAN LAW GENERALLY, AND THE NAVAJO TREATY IN PARTICULAR

A. *Secretarial approval as a pervasive element of federal Indian law.*

Merrion's conclusion that all Indian tribes, not just some tribes, must obtain the approval of the Secretary of the Interior before they may tax non-Indians finds support in the statutory framework created by Title 25 of the United States Code. Title 25 accords to the Secretary vast powers over Indian affairs. It also imposes the requirement of Secretarial approval to all but the most trivial transactions with Indian tribes.

25 U.S.C. § 2 grants to the Secretary "the management of all Indian affairs and of all matters arising out of Indian relations." See also 25 U.S.C. § 9.

Every important facet of tribal life is subject to Secretarial approval. Contracts with Indian tribes are invalid unless they are approved by the Secretary of the Interior. 25 U.S.C. § 81. Membership rolls of Indian tribes must be approved by the Secretary of the Interior. 25 U.S.C. § 163. No one may trade with Indians without the approval of the Secretary of the Interior. 25 U.S.C. §§ 261, 262. Leases of tribal lands are invalid unless approved by the Secretary of the Interior. 25 U.S.C. § 396a, § 397, § 398, § 398a, § 399, § 415. Tribal timber may only be sold with the approval of the Secretary of the Interior. 25 U.S.C. §§ 406, 407. Certain tribes have been granted the authority to enact zoning, building and sanitary regulations, but only with the approval of the Secretary of the Interior. 25 U.S.C. § 416(h). The execution of mortgages or deeds of trust by Indian landowners is subject to the approval of the Secretary of the Interior. 25 U.S.C. § 483(a).

Congress recently authorized tribes to enter into agreements for the development of their mineral resources,

subject to the approval of the Secretary. 25 U.S.C. § 2102. And, Congress just authorized tribes to adopt land consolidation plans, only with the approval of the Secretary of the Interior. 25 U.S.C. § 2203(a).

While all would concede that a tribal power to tax non-Indians has greater implications than simple contracts, leases, and sales of timber have, it remains true that there is no federal statute which expressly requires Secretarial approval of tribal taxing measures. It would be anomalous if, without Secretarial approval, a tribe could impose a multi-million dollar tax on a non-Indian, and yet be required to obtain the Secretary's approval to even contract with that same non-Indian for a \$10.00 item.

Congress' failure to address tribal taxation of nonmembers clearly reflects its understanding that Indian tribes were without such a power. See *Oliphant v. Suquamish Indian Tribe*, *supra*, 435 U.S. at 203. Unless *Merrion* is overruled by this Court, the solution to this problem is to be found in linking the tribal power to tax to Secretarial approval as a necessary implication of the Congressional scheme and as a necessary incident of the dependent status of Indian tribes.

B. Secretarial approval of Navajo tribal taxing ordinances is required by the Navajo treaty.

America's treaty with the Navajo Tribe strongly suggests that the Navajos have no power to tax non-Indians; but if they do, Secretarial approval is a necessary precondition for the exercise of the tribal taxing power. Treaty reliance is a hallmark of federal Indian law. Any fair reading of the four-page Navajo treaty suggests that General Sherman dictated its terms to a vanquished people. The treaty terminated the war between the parties, confined the Navajos to a reservation, and subjected them to the management of the agent of the United States.

Article IV of the treaty granted to the federal agent the power to inquire into complaints by or against Indians and decide disputes between the parties. II C. Kappler, *Indian Affairs, Laws and Treaties* 1016 (1904). Article XII(5) of the

treaty required the removal of the Navajo Tribe under the supreme control of the military commander of the Territory of New Mexico, and when completed, "the management of the tribe to revert to the proper agent." A fair reading of the treaty suggests that General Sherman did not believe he was leaving the Navajo Tribe with any residuum of sovereignty over non-Indians. He would have been greatly surprised to learn that the Navajos had the power to tax non-Indians.

But surprise or not, surely the treaty subjects the Tribe to the management of the federal agent. It would be anomalous indeed if the Tribe could tax non-Indians without the approval of that federal agent. While the Ninth Circuit purported to consider the treaty in connection with the Navajos' power to tax, 731 F.2d at 600, it failed to consider the treaty at all in connection with the claim that before such a tax could take effect, Secretarial approval was required.

CONCLUSION

Merrion was a jolt to American Indian law. If this Court chooses not to reverse it at this time, then it should find that Secretarial approval of tribal taxing measures is a necessary implication of the Congressionally created role of the Secretary over Indian affairs and a necessary incident of the dependent status of Indian tribes. In all events, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

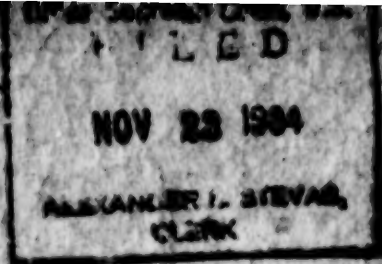
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**BRIEF OF AMICI CURIAE PHILLIPS
PETROLEUM COMPANY, ET AL.**

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Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, and Anadarko Production Company respectfully submit this brief as amici curiae in support of the position of petitioner Kerr-McGee Corporation. The written consent of the attorneys for petitioner and respondents for the filing of this brief has been obtained and filed with the Court.

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INTEREST OF AMICI CURIAE

Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas and Anadarko Production Company produce oil and gas from portions of the Navajo Indian Reservation in Utah under leases from the Navajo Tribe. If the Navajo Business Activity Tax and Possessory Interest Tax at issue in this case are ultimately upheld, these companies will, like petitioner, be required to pay those taxes. All of the oil and gas produced by these companies from the Navajo Reservation is sold in interstate commerce. The economic consequences of these tribal taxes will be felt nationwide by consumers, producers and distributors of energy from the Navajo Reservation.

The tribal leases under which these companies produce oil and gas on the Navajo Reservation were executed as early as 1947, and were all executed more than a decade before 1978, when the Navajo Tribal Council adopted the Business Activity Tax and the Possessory Interest Tax. The United States Department of the Interior approved the terms of each of these leases pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.* For a period of up to thirty years, these amici have developed the oil and gas reserves covered by their tribal leases on the Navajo Reservation in Utah. All of these operations have been supervised in detail by the Interior Department pursuant to federal regulations promulgated under section 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396d. *See* 25 CFR §211.1 *et seq.* (1984). Amici paid millions of dollars in cash

bonuses to the tribe to secure the leases; Phillips Petroleum Company, Shell Oil Company and Chevron U.S.A., Inc. alone paid the Navajo Tribe more than \$3,000,000 in bonuses for leases in Utah between 1953 and 1959. Since acquiring the leases, amici have paid the tribe federally approved royalties of between 12.5 percent and 40 percent of the value of oil and gas produced and saved. Over the past decade amici have expended substantial sums for new wells and for secondary recovery measures aimed at increasing the productive life of oil and gas wells on the Navajo Reservation.

These amici curiae have themselves challenged the Navajo Business Activity Tax and the Possessory Interest Tax in litigation pending in the Tenth Circuit. See *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). The Tenth Circuit's decision in *Southland*, rendered August 22, 1983, held that federal law does not require the Secretary of the Interior's review of these taxes and that the tribe's taxing power over oil and gas lessees is not divested by federal authority. 715 F.2d at 489. On September 20, 1983, amici petitioned the Tenth Circuit for rehearing in the *Southland* cases and suggested that rehearing be held *en banc*. Our petition for rehearing is pending.

Amici thus have a direct and vital interest in the issues presented in Kerr-McGee Corporation's petition. The outcome of this case and of the *Southland* cases will determine the viability of amici's investments in the Navajo Reservation and will shape future decisions regarding energy development of tribal lands throughout the United States.

SUMMARY OF ARGUMENT

Navajo taxes on energy exceed the limits imposed by federal law on the tribe's sovereignty over its external relations. In the absence of an express delegation of authority from Congress, tribes like the Navajo cannot lawfully govern their relations with non-Indians beyond what is necessary to protect tribal self-government or control internal relations. Because the Navajo taxes would impact producers, distributors and consumers of energy throughout a large sector of the United States, and because Congress has never authorized tribes not organized under federal law to regulate their external relations so sweepingly, the Navajo taxes must be invalidated.

The Navajo power to tax petitioner was, in any event, divested by the Secretary's regulation of tribal oil and gas operations for the common benefit of the lessor, the lessee and the consuming public. Congress has delegated to the Secretary the power to manage the tribe's energy resources. The Secretary's regulations are comprehensive and leave no room for regulation by another sovereign. The Navajo taxes will conflict with the objectives of Secretarial regulation and will undermine the leasing program mandated by Congress.

Even if the tribal power to tax oil and gas producers has not been so divested, it cannot be lawfully exercised without the approval of the Secretary. The requirement of Secretarial approval is a natural consequence of both the Secretary's pervasive duties in the area and the dependent status of the Navajo Tribe.

ARGUMENT

I. NAVAJO ENERGY TAXES EXCEED THE LIMITS IMPOSED BY FEDERAL LAW ON THE TRIBE'S SOVEREIGNTY

As separate sovereigns in the federal system, the states are free to tax locally produced natural resources sold or consumed beyond their borders, subject to the requirements of the Commerce Clause. Standing alone, the nondiscriminatory economic burden of state severance taxes on out-of-state consumers or businesses is insufficient to invalidate the taxes. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-25 (1981). Indian tribes, however, possess sovereignty of a diminished character. Although they may provide for their self-government and manage their territory, they may not regulate their external relations, that is, their relations with non-Indian citizens outside the reservation boundaries. In *United States v. Kagama*, 118 U.S. 375, 379-81 (1886), this Court said that the tribes govern "not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations" Since the sovereignty of the Navajo Tribe falls short of permitting it to impair the economic interests of citizens beyond its reservation boundaries, and because that will be the direct consequence of the Business Activity Tax and the Possessory Interest Tax, these Navajo taxes must be invalidated.

A. *The Navajo Taxes Will Directly Impair the Interests of Non-Indian Citizens in Many States*
Energy development on Navajo lands is a matter of

national importance. The Navajo Tribal Council has characterized the Navajo Nation, covering 14 million acres in three states, as "a principal supplier of crucial energy resources critical to the development of the United States economy." Navajo Tribal Council Resolution CAP-34-80 (April 29, 1980). The Navajo Reservation is the largest of the 271 Indian reservations and communities in the United States and comprises more than one fourth of all Indian lands, both tribal and allotted, in the nation. The Utah portions of the Navajo Reservation have produced more than 200 million barrels of oil and more than 210 billion cubic feet of natural gas since the Utah Division of Oil, Gas and Mining began to keep production records in the early 1950's. Although neither the Bureau of Indian Affairs nor the United States Geological Survey has ever conducted a survey of the reserves of oil and gas on Navajo Reservation lands, the Navajo Tribal Minerals Development Office estimated in 1975 that there remained 100 million barrels of oil and 25 trillion cubic feet of natural gas. *Bureau of Competition, Federal Trade Commission Staff Report on Mineral Leasing on Indian Lands* (Oct. 1975) at 8 (hereinafter "Report on Mineral Leasing on Indian Lands"). All of the oil and gas produced and saved by these amici pursuant to their Navajo leases in Utah is sold in interstate commerce. Most of the oil from the Reservation is refined in Texas, and the refined products are sold throughout the Southwest and Midwest. Gas from the Reservation is transmitted to markets between New Mexico and central California.

The Navajo Business Activity Tax and Possessory

Interest Tax will naturally affect the prices consumers in these regions pay for energy resources originating on Navajo lands. Just as certainly, these tribal taxes will affect the willingness of producers to risk money on new development and exploration and on enhanced recovery measures for old wells on the reservation. Like all other energy producers in Utah, amici pay state taxes on production of Navajo resources and on property involved in production. The addition of Navajo tribal taxes on their property and production will place amici at a distinct commercial disadvantage with respect to competitors who produce oil and gas off the reservation. In the long run, the Navajo taxes will prevent the development of resources that otherwise would be sold to consumers throughout the western half of the United States.

The scale of energy development from the Navajo Reservation underscores an important fact: Navajo taxes on energy production and property will seriously affect the interests of non-Indians residing far beyond the boundaries of the Navajo Reservation. Although the inherent sovereignty of a tribe to control economic activity on its reservation and to manage its resources through taxation is now established, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), tribal taxes that seriously affect the interests of non-Indians outside the reservation must be analyzed differently. The Navajo taxes at issue here place in the hands of the Navajo Tribal Council the power to disrupt or discontinue the flow of important resources to consumers in many states. It is difficult to imagine a more potent tool for the Tribe to affect its external relations.

B. *The Navajo Tribe Lacks the Power to Regulate the Interests of Non-Indians Outside the Reservation.*

In *Montana v. United States*, 450 U.S. 544, 564 (1981), the Court stated:

[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. [Citations omitted.] *But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.*

(Emphasis added.) In reaching this conclusion, the Court drew from a line of authority — extending back to the first Indian case to reach this Court — prescribing the limits of tribal sovereignty. These cases teach that the dependent status of the tribes has stripped them of the “freedom independently to determine their external relations.” *United States v. Wheeler*, 435 U.S. 313, 326 (1978). See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-10 (1978); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); *United States v. Kagama*, *supra*, 118 U.S. at 381-82 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Fletcher v. Peck*, 10 U.S.

(6 Cranch) 87, 147 (1810).¹

The unfettered power of the Navajo Tribe to tax energy production is the power not only to undermine the leasing program mandated by Congress in the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.* (see Part II of this Argument); but it is as well the power unilaterally to burden the cost of energy for consumers and even to deprive millions of non-Indian citizens of the resources on which they depend. Congress has committed these resources to the management of the Secretary of the Interior, who must presumably execute his duty for the benefit of the entire nation, and not merely with an eye to the protection of the tribe's narrow economic interests. Congress has not delegated to the tribe any authority to control or manage the development of oil and gas on Navajo tribal lands. Because the continued development of those resources has a direct and substantial impact far beyond the reservation, the Navajo

¹ Likewise the *Handbook of Indian Law*, which has been cited repeatedly by this Court, confines the retained sovereignty of the tribes to matters of internal self-government:

[T]he powers implicitly lost by tribes are the power to transfer tribal land without federal approval, the power to carry on relations with nations other than the United States, the power to regulate non-Indians when no tribal interest justifies such regulation, and the power to impose criminal punishment on non-Indians

. . . Under some circumstances tribal powers can extend over members going beyond reservation boundaries, as well as over nonmembers within those boundaries. The determinative factor is whether the matter falls within the ambit of internal self-government.

R. Strickland, et al., Felix S. Cohen's *Handbook of Federal Indian Law* (1982 ed.) 245-46 (emphasis added) (hereinafter "*Handbook of Federal Indian Law*").

taxes cannot survive without express congressional delegation.

This case is fundamentally different from *Merrion v. Jicarilla Apache Tribe*, *supra*. The Jicarilla Apache Reservation is approximately five percent of the size of the Navajo Reservation, and the Jicarilla lands committed to energy production are proportionately smaller.² As a result, the national impact of Navajo energy taxes will be significantly greater than the impact of the Jicarilla taxes. But two additional factors decisively distinguish *Merrion*. First, Congress explicitly permitted tribes, like the Jicarilla Apache Tribe, organized under the Indian Reorganization Act, 25 U.S.C. §§476-77, to manage development of their own leased minerals with the approval of the Secretary of the Interior. See 25 U.S.C. §396b; *Merrion*, *supra*, 455 U.S. at 150. As this Court said in *Merrion*, "Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." *Id.* at 155. Congress has not, however, "affirmatively acted" to permit the Navajo Tribe to regulate the flow of oil and gas from the Reservation; to the contrary, the Navajos claim the inherent authority to do so free of federal control. It is inconceivable that, as a matter of federal law, the Navajo Tribe holds the power to manipulate — through taxation — the nationally important reserves of

² Between 1961 and 1974, approximately 220 tracts from the Jicarilla Apache Reservation were offered for oil and gas leasing purposes. During the same period, over 2100 tracts from the Navajo Reservation were offered for oil and gas leasing. *Report on Mineral Leasing on Indian Lands*, *supra*, at 106.

oil and gas held in trust by the United States and to do so without Secretarial supervision.³

Second, and undoubtedly because of the Secretary's approval of the Jicarilla Apache taxes in accordance with law, the Court in *Merrion* made no particularized inquiry into the national impact of the Jicarilla Apache taxes on energy from that tribe's lands. The Court characterized the tribe's power to tax as an aspect of the tribe's power to control economic activity and territorial management. 455 U.S. at 137. In this case, however, the Navajos' right to manage tribal lands and their internal economy cannot possibly justify the sweeping economic consequences of those taxes to non-Indians outside the reservation. The importance of the resources at issue here transcend the Navajos' localized desire to govern themselves. At the very least, the Navajos' claimed right to regulate the economic interests of non-Indians outside the reservation must be carefully weighed against the national interest in maintaining inexpensive domestic sources of energy. If, as we believe, the national interest at stake in these tribal taxes is found to outweigh

³ In his most comprehensive opinion on the scope of tribal powers, the Interior Solicitor concluded that, although the tribes generally possess the power to tax nonmembers accepting the privilege of trade with the tribes, the power of tribes to tax non-Indians whose relations are governed by the Interior Department is different:

[Since] Congress has conferred upon the Commissioner of Indian Affairs exclusive jurisdiction to appoint traders on Indian reservations and to prescribe the terms and conditions governing their admissions and operations . . . an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the Commissioner of Indian Affairs to do so.

"Powers of Indian Tribes," 55 I.D. 14, 48 (1934). Accord: 1 Op. Att'y Gen. 645, 650 (1824).

the tribal interest in self-government, the limits of the tribe's inherent sovereignty must be accordingly limited to prevent the imposition of the taxes.

II. FEDERAL REGULATION OF TRIBAL OIL AND GAS PRODUCTION DIVESTS THE NAVAJO TRIBE OF THE POWER TO TAX OIL AND GAS PRODUCTION AND PROPERTY.

If the Navajo Tribe ever possessed the power to regulate oil and gas production consumed beyond the borders of its reservation, that power was divested by the comprehensive enactments of Congress giving the Secretary of the Interior the power to regulate the leasing and production of oil and gas from tribal lands. In proceedings below, the Ninth Circuit rejected the contention that the Indian Mineral Leasing Act, 25 U.S.C. §396a *et seq.*, deprived the Navajos of the power to levy these taxes. The Ninth Circuit held that (1) the purpose of the Indian Mineral Leasing Act "was not to generate distinctions" between tribes organized under the Indian Reorganization Act, whose taxing authority was not divested by federal regulation, and tribes not so organized, and (2) nothing in the Indian Mineral Leasing Act mentions tribal taxation. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 601 (9th Cir. 1984). The Ninth Circuit, however, failed to take into consideration the comprehensive character of federal regulation over Navajo oil and gas operations and the necessary conflict between federal control and tribal regulation of the same subject matter.

A. *Federal Regulation of Navajo Oil and Gas Operations is Comprehensive*

In the Indian Mineral Leasing Act, 25 U.S.C. §396a, *et seq.*, Congress directed the Secretary to promulgate rules and regulations covering "[a]ll operations under any oil, gas, or other mineral lease issued pursuant to any act affecting restricted Indian lands." 25 U.S.C. §396d. The Act was intended to be the "comprehensive legislation governing the leasing of tribal lands for mining purposes." *Handbook of Federal Indian Law, supra*, at 534. Pursuant to Congress's broad directive, the Secretary has promulgated a comprehensive array of regulations to cover every aspect of the acquisition of oil, gas and mineral leases from tribes, the terms of such leases, the timing of payments under such leases, operations under leases, cancellation and assignment of leases, safety, disposal of waste, surface restoration, unitization and cooperative development of leased property, and mining and processing methods. *See* 25 CFR Parts 211-27 (1984). The regulations apply to both allotted and tribally held lands, except where superceded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act and approved by the Secretary. 25 C.F.R. §211.39 (1984).

The Secretary's regulations serve at least four purposes integral to the success of oil and gas operations on tribal lands.

First, the regulations created a uniform scheme for the acquisition and development of "[a]ll operations under any oil, gas or other mineral lease issued pursuant

to the terms of any act affecting restricted Indian lands." 25 U.S.C. §396d. Uniformity in the law relating to the leasing of tribal lands was Congress's express purpose in the Indian Mineral Leasing Act. H. R. Rep. 1872, 75th Cong., 3d Sess. (March 3, 1938). In the case of tribes that did not organize under the Indian Reorganization Act, the goal of uniformity was met by the Secretary's consistent application of national regulatory standards. In the case of organized tribes, the goal of uniformity was advanced by the requirement of prior Secretarial approval of tribal resolutions affecting the leasing of oil and gas property. *See Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981) *amended*, 665 F.2d 1390 (9th Cir.), *cert denied*, 459 U.S. 916 (1982) (stating that the Act gave organized tribal governments "control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part with the Secretary.").

Second, the regulations discharge the trust responsibility of the United States to the tribes by carefully prescribing the conditions of development and terms of compensation to the tribes. *Kenai Oil & Gas Corp. v. Department of the Interior*, 522 F. Supp. 521, 535 (D. Utah 1981); *United States v. 9,345.53 Acres*, 256 F. Supp. 603, 605 (W.D.N.Y. 1966), *rev'd on other grounds sub nom. United States v. Devonian Gas & Oil Co.*, 424 F.2d 464 (2d Cir. 1970).

Third, the Secretary's regulations protect the rights of private lessees. For example, they provide that lessees

may not be "held liable for loss or destruction of . . . oil . . . by causes beyond the lessee's control." 25 C.F.R. §211.13 (1984). They provide that gas produced from leases may only be used by the tribal lessor if the lessee's requirements for development and operation of the leases have been met. *Id.* Most significantly, the regulations prohibit any escalation in the percentage royalty to the tribal lessor after advertisement of the lease for bid. *Id.* Elsewhere the regulations prohibit the application of any new regulations, after Secretarial approval of the lease, that would "operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease." *Id.* §211.28. In protecting the lessees of tribal lands from unconsented changes in the tribe's remuneration or other essential lease terms, the Secretary's regulations ensure the continued viability of operations under tribal leases. If the tribes are free unilaterally to increase their share of the proceeds from oil and gas operations, Secretary-approved leases mean nothing, and the lessees' incentive to continue investing and operating is reduced.

Fourth, consistent and continued federal supervision over all aspects of oil and gas development on tribal lands guarantees the availability of those critical resources to the public. The Interior Department's *Handbook on Federal Indian Law* noted:

Recognition of energy shortages has brought the economic significance of Indian energy resources into sharp focus In 1973 the Department of the Interior estimated that the oil and gas reserves of forty Indian reservations amounted to 4.2 bil-

lion barrels of oil and 17.5 trillion cubic feet of gas. Those figures represented roughly three percent of the nation's known reserves at that time. Indian coal reserves are located on at least thirty-three reservations which, as of 1975, were estimated to contain from one hundred to two hundred billion tons or from seven to thirteen percent of the nation's total identified reserves.

Handbook of Federal Indian Law, supra, at 531. In 1975, the staff of the Federal Trade Commission reported that "in both absolute and relative terms, from a national perspective . . . the mineral resources on Indian lands are great indeed." *Report on Mineral Leasing on Indian Lands, supra*, at 10. The same report found that, despite the national importance of these resources, each tribe has formulated its own leasing policy independent of any overall federal energy program. "Each tribe's leasing objectives are felt to be valid for that tribe, even if they differ from those of other tribes or those of public land leasing." *Id.* at 39. Under these circumstances, it is inconceivable that Congress would cede ultimate management authority over these resources to the tribes. To the contrary, the Secretary's comprehensive regulations under the Indian Mineral Leasing Act and his supervision of organized tribal regulations assure the continued dominance of a national energy policy for the public good.

B. *The Navajo Taxes Conflict with Federal Regulation*

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court characterized tribal taxing power as a retained attribute of tribal sovereignty except as a tribe may be "divested

of it by federal law or necessary implication of their dependent status." 447 U.S. at 152. Respecting the doctrine of federal "divestiture" of tribal sovereignty, the *Colville* Court commented: "This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government" *Id.* at 153-54. In the present case, the facts argue forcefully for divestiture of tribal sovereignty. Without federal approval and independent of any federal supervision, the Navajos have asserted the power to tax an area that is comprehensively regulated by the Secretary. With one significant exception, the Secretary's regulations fully occupy the field of tribal oil and gas leasing operations — leaving no room for regulation by any other sovereign.⁴ The sole excep-

⁴ At least three lower courts have concluded that the Indian Mineral Leasing Act preempts state regulation on restricted Indian lands. See *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981) amended, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982) (holding that the Act preempted Montana's coal severance tax on the Crow Tribe's lessees); *Samedon Oil Corp. v. Cotton Petroleum Corp.*, 446 F.Supp. 521 (W.D. Okla. 1978) (holding that the Secretary's regulations precluded the application of Oklahoma's communitization orders on tribal lands, in the absence of Secretarial approval of the orders); *Assiniboine & Sioux Tribes v. Calvert Exploration Co.*, 223 F.Supp. 909 (D. Mont. 1963) (state-ordered pooling on Indian oil and gas lands was precluded by federal regulation, in the absence of Secretarial approval), rev'd on other grounds sub nom. *Yoder v. Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964) (holding the case should be dismissed for lack of jurisdictional amount). See also *Blackfeet Tribe of Indians v. Montana* 729 F.2d 1192, 1203 (9th Cir.), cert. granted, 53 U.S.L.W. 3235 (1984). Likewise the Solicitor of the Interior Department has twice concluded that the Indian Mineral Leasing Act preempts state taxation of non-Indian mineral production on tribal lands. 84 I.D. 905 (1977); 86 I.D. 181 (1979). See also B. T. Dolan, "State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations," 21 *Rocky Mtn. Min. L. Inst.* 475, 527 (1975) ("the federal government has entirely occupied the field").

tion to the Secretary's exclusive authority derives from language in the Indian Mineral Act itself.

Thus the proviso in Section 2 of the Indian Mineral Leasing Act, 25 U.S.C. §396b, permits tribes organized under the Indian Reorganization Act "to lease lands for mining purposes" in accordance with tribal constitutions and charters adopted under the Indian Reorganization Act. Referring to this proviso, *Merrion* held that the Indian Mineral Leasing Act "does not prohibit the Tribe from imposing a severance tax on petitioner's mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary." *Merrion, supra*, 455 U.S. at 158. The Act does not, however, confer any similar authority upon tribes, like the Navajo Tribe, which have never organized under the Indian Reorganization Act. As to the Navajos, the authority to regulate oil and gas lessees remains where Congress conferred it in the Indian Mineral Leasing Act — with the Secretary of the Interior.

Any different result would ignore Congress's explicit differentiation between organized and other tribes and would, moreover, conflict with the purposes of the Indian Mineral Leasing Act. If tribes having no authority from Congress are left at large to tax the business or property of their oil and gas lessees, the effective burden on lessees will vary drastically from reservation to reservation, despite the objective of uniform federal regulation. The Secretary's prescription of uniform terms of compensation in tribal leases and his exclusive power to fix

higher rates of royalty will become irrelevant if unauthorized and unsupervised tribes may exact additional compensation in the form of taxes.⁸ Further, the Secretary's regulations protecting the rights of lessees will become meaningless if the Navajo Tribe may, without federal supervision, penalize or terminate the rights of lessees under tribal tax ordinances.

The unsupervised power of tribal taxation, and particularly the tribal power unilaterally to discontinue the rights of lessees, will jeopardize the very tribal interests normally protected by the Secretary's regulations. In *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.), cert. denied, 52 U.S.L.W. 3461 (1983), the Ninth Circuit held that the tribe could not lawfully terminate a commercial lease without Secretarial approval. In the course of its opinion, the court said:

[P]ossession by a tribe of a unilateral power to terminate will tend to depress the value of the lease to the lessee and discourage the erection of substantial improvements on the leasehold. This could reduce the return to tribes from long-term commercial leases. . . . It is doubtful that lessees will be able to purchase sufficient immunity from

⁸ *Merrion* cautioned against confusing the tribe's role as a "commercial partner," whose royalty is fixed by lease, with its role as a sovereign having the power to tax without the consent of taxpayers: "Whatever place consent may have in contractual matters . . . it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *Merrion*, supra, 455 U.S. at 147. Where, however, the tribe's unsupervised power of taxation undermines the power of the United States to regulate the duration of leases and lease compensation, consent or the absence of consent is not the issue. Rather, the continued supremacy of federal policy is at stake.

terminations to enable the tribes, in a sense, "to capitalize" the value of their termination power by insisting upon a lease bonus as the price of its surrender. Should this be true it is likely that commercial leases will yield a lower return to the tribes.

707 F.2d at 1075. The problems created by Navajo tax ordinances are precisely analogous. The tribal power to tax and terminate private energy development will naturally depress the value of oil and gas leases to the lessee—a result with which the Secretary must be vitally concerned if he is to regulate leasing for the long-term benefit of the Tribe. Directed by an independent judgment and will, the Navajo Tribe will be free to burden or discontinue oil and gas development for its own purposes. The most fundamental objective of the Indian Mineral Leasing Act and the Secretary's regulations is that private development of tribal lands will continue within the framework of federal supervision. The Navajo taxes approved by the Ninth Circuit would jeopardize that objective and therefore cannot stand.

III. THE NAVAJO TAXES ARE INVALID UNLESS APPROVED BY THE SECRETARY

The Ninth Circuit held that neither the Indian Mineral Leasing Act nor the Indian Reorganization Act requires that the Secretary review and approve the Business Activity Tax and Possessory Interest Tax as a prerequisite to their validity. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, supra, 731 F.2d at 604. The Ninth Circuit's decision, however, does not explain how the Secretary's refusal to review the Navajo taxes can be squared with

his statutory duty to regulate "[a]ll operations under any oil, gas or other mineral lease." 25 U.S.C. §396d. As we have argued in Part II of this Argument, the Tribe's unrestrained power to tax is no less than the power unilaterally to manipulate the leasing program entrusted to the Secretary's care. The Secretary cannot be said to have discharged his duty to regulate if he permits the Navajo Tribal Council to regulate in his place. Secretarial review of tribal energy taxes is the very least that producers may expect from statutorily mandated federal supervision of reservation oil and gas operations.

The requirement of Secretarial approval of tribal energy taxes is a natural consequence of the dependant status of Indian tribes. In *Merrion*, this Court said with reference to the Jicarilla Apache Tribe:

Of course, the Tribe's power to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Merrion, *supra*, 455 U.S. at 141. Elsewhere *Merrion* affirmed the importance of Secretarial review and approval as having been required by Congress "to monitor such exercises of tribal sovereignty." *Id.* at 155.

Since the Secretary has failed in this case to review the tribal taxes, there exists no "constraint" to temper the concern that the Navajo Tribal Council will act "in an unfair or unprincipled manner." There will be no insurance that the "exercise of the tribal power to tax will be consistent with national policies." The decision of the Ninth Circuit on this point ignores both the importance of Secretarial review to producers and the requirements of Congress's delegation of authority in the area.

CONCLUSION

This case is a watershed in the history of tribal sovereignty. If the decision of the Ninth Circuit is to be affirmed, this Court will turn away from its own decisions extending over 170 years, which have restrained tribes from regulating their external relations with non-Indian citizens outside reservation lands. The power to tax nationally critical resources free of federal constraint and irrespective of federal purpose exceeds even the most expansive definitions of tribal sovereignty announced by this Court. Either the Navajo Tribe is a domestic, dependant sovereign without the power to impair the interests of citizens beyond reservation boundaries — in which case the Navajo taxes are unlawful — or else the Navajo Tribe is an independent sovereign on an equal footing with the states. It is impossible to square the settled limits on the sovereignty of the Navajo Tribe with the tribal power of taxation claimed in this case.

The Navajos' taxing power cannot coexist with the comprehensive regulatory authority of the United States. If the Ninth Circuit's decision is affirmed, the federal authority vested by the Indian Mineral Leasing Act will

be comprehensive in name only. The Navajo taxing power would diminish federal authority just as surely as a tribal attempt to regulate the details of oil and gas leasing without federal oversight. At a minimum, the Secretary of the Interior must be required to review the Navajo taxes. His approval as a prerequisite to the validity of the taxes is the least that can be expected of federal supervision.

For the foregoing reasons, these amici urge the Court to reverse the decision below and to hold that the Navajo Possessory Interest Tax and Business Activity Tax are unlawful and void.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

KERR-McGEE CORPORATION,
Petitioner

v.
THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE ARIZONA PUBLIC
SERVICE COMPANY AND SOUTHERN CALIFORNIA
EDISON COMPANY IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI CURIAE

The Amici have extensively researched the history of Navajo tribal government, including a review of all minutes of proceedings of the Navajo Tribal Council since the date of its creation by the Department of the Interior on January 27, 1923. This research uncovered statements to the Navajo Tribal Council by the Commissioner of Indian Affairs and other federal officials, contemporaneous with Acts of Congress bearing on tribal self-government, directly related to the powers of the Navajo Tribal Council in the absence of a congressionally authorized constitution. The

Amici believe that this historical analysis will assist this Court in understanding the extent to which that portion of the opinion of the lower court upholding the lawfulness of Navajo tax ordinances absent their approval by the Secretary of the Interior constitutes a departure from the long-standing views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

Amicus Arizona Public Service Company is the project manager of the Four Corners Generating Station, a coal-fired electric generating facility owned by Arizona Public Service Company, Tucson Electric Power Company, Public Service Company of New Mexico, Southern California Edison Company, El Paso Electric Company, and Salt River Project Agricultural Improvement and Power District. The co-owners of that facility purchase coal for its operation from Utah International, Inc., a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation. Pursuant to the fuel supply contract with Utah International, the co-owners are obligated to pay, as an element in fuel costs, lawful taxes imposed by governmental authorities.

Amicus Arizona Public Service Company is also sole owner of the Cholla Generating Station, a coal-fired electric generating facility. Arizona Public Service Company purchases coal to operate this facility from Pittsburg and Midway Coal Company, a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation, under a fuel supply contract obligating the utility to pay, as an element in fuel costs, lawful taxes imposed by governmental authorities.

Amicus Southern California Edison Company is the project manager of the Mohave Generating Station, a coal-fired electric generating facility owned by Southern California Edison Company, Salt River Project Agricultural Improvement and Power District, Nevada Power Company, and the Department of Water and Power of the City of Los Angeles. The co-owners purchase coal to operate this facility from

Peabody Coal Company, a non-Indian coal supplier whose mining operations are conducted on the Navajo Reservation. Again, under the fuel supply contract for this facility, the co-owners are obligated to pay lawful taxes imposed by governmental authorities as an element of fuel costs.

The Navajo Tribal Council has enacted a Possessory Interest Tax ordinance and a Business Activity Tax ordinance, each of which is applicable to persons conducting business within the Navajo Reservation, including each of the above referenced coal suppliers. Each of the utilities named above is directly affected by these tax ordinances by virtue of the fuel supply contracts with their respective coal suppliers. In addition, because the costs incurred by these utilities, including taxes, generally are costs taken into account in the establishment of rates charged to consumers of electricity in the areas served by them, these tax ordinances indirectly affect the consumers of electricity in the States of Arizona, California, Nevada, New Mexico and Texas.

The amici submit that the opinion of the Ninth Circuit is at direct variance with this Court's opinion in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and wholly inconsistent with the longstanding views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council.

ARGUMENT

I. INTRODUCTION

The holding of the lower court that the two tax ordinances in question are effective, even absent the approval of the Secretary of the Interior, rests upon two fundamental (albeit unarticulated) and equally erroneous propositions:

- 1) That the Navajo Tribe without following procedures established by Congress for implementing tribal self-government (and indeed, having rejected at least two invitations to pursue them) may nevertheless exercise the full measure of a retained power of inherent sovereignty free of supervision by the Secretary, and

2) That the Navajo Tribal Council is the body duly constituted and empowered to exercise sovereign powers for and on behalf of members of the Tribe, and free of supervision by the Secretary.

When these two bases for the lower court's decision are viewed in the light of the historical record concerning the tribal government reform movement, it can readily be seen that the lower court has declared two separate congressional enactments to have been wholly superfluous legislative exercises, and has imposed upon members of the Navajo Tribe a governing body never constituted by them.

II. HISTORY DEMONSTRATES THAT SECRETARIAL APPROVAL OF NAVAJO TRIBAL COUNCIL ORDINANCES IS ESSENTIAL TO THEIR EFFECTIVENESS.

A. The History of Navajo Tribal Government Demonstrates That The Navajo Tribal Council Has Not Been Empowered to Exercise Governmental Power Over Non-Indians Absent Secretarial Approval.

The Navajo Tribal Council is not the child of the Navajo people but, rather, was created by, and continues to exist by the authority of, regulations promulgated by the Secretary of the Interior. The Navajo people have never empowered the Navajo Tribal Council to exercise whatever sovereign powers might be possessed by the Navajo people, despite repeated attempts by Congress and the Executive Branch to encourage them to do so. The history of Navajo tribal government conclusively demonstrates that the Navajo Tribal

Council has never been empowered to enact legislation free of supervision and control by the Secretary of the Interior.¹

Until the first years of the Twentieth Century, the Navajo people did not have or recognize any tribal government which could speak for and bind all members of the Navajo Tribe. The fundamental, organic law of the Navajo people was embodied in the culture, traditions, customs and institutions comprising Navajo society which, in turn, was organized into inter-cooperating groups based on family relationships. *Plural Society* at 169-172. Navajo tradition and custom did not recognize any coercive power in the leadership of any group or in the group itself. Order was maintained and decisions of the group were enforced by argument, persuasion, urging and peer pressure. Delegation of power or authority to one Navajo or to a group of Navajos to supervise or direct the conduct of other Navajos was unknown and contrary to the culture, traditions, customs and institutions of the Navajo people. *A Political History* at 48-49, 91.

The dawn of "tribalism" on the part of the Navajo people has been traced to increased interest in the mineral deposits within the Navajo Reservation, paralleling the enactment by Congress of a series of statutes relative to the exploitation of mineral resources within Indian reservations. *A Political History* at 53-58. Under the pattern of legislation that

¹ The history of Navajo tribal government and the role of the Secretary of the Interior in managing the affairs of the Navajo Tribe is fully set forth in the writings of Dr. Robert W. Young. The principal writings of Dr. Young include: "The Origin and Development of Navajo Tribal Government," *The Navajo Yearbook, Report No. viii, 1951-1961 A Decade of Progress* 371 (1961), an official publication of the Department of the Interior prepared in conformance with the Navajo-Hopi Rehabilitation Act (hereinafter "Navajo Yearbook"); "The Rise of the Navajo Tribe," *Plural Society in the Southwest* 167 (E. Spicer and R. Thompson 1972) (hereinafter "Plural Society"); and *A Political History of the Navajo Tribe* (1978) (hereinafter "A Political History"). *The Navajo Yearbook* has been cited by this Court as an authoritative source on Navajo tribal government. See *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

existed in the early 1920's, mineral leases were permissible if entered into by the authority of a "council" speaking for the affected Indian tribe. *See, e.g.*, 25 U.S.C. §398. The absence of any recognized council authorized to speak on behalf of the Navajo Tribe caused a disruption in the manner in which the Department of the Interior supervised and managed the exploitation of mineral resources within the Navajo Reservation. *Navajo Yearbook* at 373-375.

After a period of confusion, on January 27, 1923, the Department of the Interior promulgated "Regulations Relating to the Navajo Tribe of Indians," which stated at section 3 that there "shall be created a continuing body to be known and recognized as the 'Navajo Tribal Council' with which administrative officers of the Government may directly deal in all matters affecting the tribe." *Navajo Yearbook* at 393. The 1923 Regulations, as revised from time to time, created a continuing body—not a governing body—and its purpose was very limited.² *Tribal government functioned under the supervision and control of the Secretary.*

On April 21, 1933, John Collier was appointed Commissioner of Indian Affairs. This appointment, echoing the era of the New Deal insofar as it pertained to Indian relations, brought changes in the approach of the federal government to the supervision of Indian tribes. This new approach was embodied in the Wheeler-Howard Act, also known as the

² "It must be noted that under the Regulations and pursuant to Federal policy in the 1920s, the Council thus created, not by the Navajo people but by the Secretary of the Interior, was *not*, in fact or in function, to be construed as a *governing body*. Nowhere in the Regulations was there any specific mention of tribal authorities or tribal powers. The Council could vote 'on all matters coming before it'—presumably to accept or reject them in the name of the Tribe, but the Regulations recognized no legislative powers in the Council, nor did they fix any executive authorities in the Council Chairman. The regulations opened no avenues through which the Tribe could *initiate* action for the benefit of the Navajo public." *A Political History* at 62 (emphasis in original). *See also A Political History* at 69.

Indian Reorganization Act, enacted by Congress on June 18, 1934. Generally, 25 U.S.C. §461 *et seq.*

The Indian Reorganization Act was not to apply to any reservation if a majority of the adult Indians voted against the application of the Act at a special election called by the Secretary of the Interior. 25 U.S.C. §478. Acceptance of the Act by the Navajo people was a matter of importance to the federal government. In early 1934, representatives of the Department of the Interior, including Commissioner Collier, visited Indian tribes throughout the United States to secure their preliminary approval of the principal features of the bill then pending in Congress. *See Cohen, Federal Indian Law* 129 (Revised by United States Interior Department 1958). Several meetings were held with the Navajo Tribal Council. Because contemporaneous constructions of the Indian Reorganization Act by officials of the Department of the Interior are persuasive and deserve the respect of courts interpreting its effect, *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982), a review of statements by federal officials contemporaneous with enactment of the Indian Reorganization Act is essential to an understanding of the issue brought before this Court.³

³ This Brief sets forth excerpts from the minutes of meetings of the Navajo Tribal Council. Under the 1923 Regulations, which, with certain amendments, continued in effect until 1938, meetings of the Council were held at a time and place designated by the Commissioner of Indian Affairs, no meeting of the Council could be held without the presence of an official of the United States designated by the Commissioner of Indian Affairs, and the designated official was directed to keep a record of the proceedings of all Council meetings, with the original record of the proceedings being forwarded to the Commissioner of Indian Affairs. *See Navajo Yearbook* at 393-400. Under the 1938 Rules (*Infra* at 10), which were amended as late as 1966, meetings of the Council were called by the Commissioner of Indian Affairs upon request of the Executive Committee of the Council, and the Chairman of the Council was directed to make a proper record of the proceedings of all Council meetings. *See Navajo Yearbook* at 407-411. Thus, the minutes of meetings of the Navajo Tribal Council, being both authorized and required by federal regulations, constitute public records.

On March 12, 1934, Commissioner Collier met with the Navajo Tribal Council and, in explaining the advantages that might be derived from the self-government provisions of the bill then pending in Congress, described the then status of Navajo tribal government as follows (emphasis added):

The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny everyone of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.

In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have. He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner. There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. Now what we are seeking in this Title

One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs. And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Fort Defiance, Arizona, March 12, 1934.

On April 9, 1934, Mr. J. M. Stewart, a subordinate of Commissioner Collier, once again met with the Navajo Tribal Council to discuss the self-government provisions of the bill then pending in Congress, and answered questions from members of the Council in the following manner:

Q. Do we have any power now as a nation?

A. Not under existing law, no.

• • •

Q. It seems that we have a voice in a lot of matters we have already undertaken, such as the council election. We have a voice in the election of our head men. These have been recognized by the people.

A. You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. You have no authority under the present set-up.

• • •

Q. Isn't it possible that the Navajos can get by without a charter?

A. Of course, any Indian tribe can get by without it.

Q. I mean and still have power.

A. No, in order to get the benefits, educational and other, there must be a charter granted.

Minutes of the Special Session of the Navajo Tribal Council, 24, 27, held at Crownpoint, New Mexico, April 9, 1934.

In an election held on June 17, 1935, the Navajo people rejected the application of the Indian Reorganization Act by a vote of 7,992 to 7,608. *Navajo Yearbook* at 377. As a result, the Tribal Council continued to exist by virtue of the 1923 Regulations, as amended. *Tribal government continued to function under the supervision and control of the Secretary.*

In the face of the rejection of the Indian Reorganization Act by the Navajo Tribe, Commissioner Collier went forward with attempts to reorganize the Tribal Council through administrative proceedings and amendments to federal regulations. The result of this attempt was the convening of a constitutional assembly in April, 1937, consisting of tribal delegates from throughout the Navajo Reservation. The intent and purpose of this constitutional assembly was to organize itself and declare itself to be the Navajo Tribal Council, and thereafter seek its approval by the Secretary of the Interior and Congress as the authorized body entitled to speak for the Navajo people. On the first day of the constitutional assembly, E. R. Fryer, General Superintendent of the Navajo Reservation, addressed the assembled delegates and made the following statements concerning the delegates and the necessity for a constitution (emphasis added):

So, my friends, you meet today as delegates to a constitutional assembly nominated by the people from your several districts and selected because of your outstanding qualities of leadership and because your combined leadership extends into every corner of the land where the Navajos live.

• • •

And so, my friends, you meet here as petitioners, not as demanders. You are appealing to the Commissioner of Indian Affairs and to the Secretary of the Interior to grant you a greater participation in tribal affairs through a new tribal constitution. To many of you, the word "Constitution" probably brings a picture of a barbed wire fence which presents a difficult hurdle. Many of you have never before heard the word; many of you do not know the meaning of it. It is simply a word that is used to represent pieces of paper that have words written on them to tell of the rights and privileges of a certain group of people.

A Navajo "Constitution" would be pieces of paper that would give to every Navajo certain rights and privileges and which would give to the Navajo representatives the right to speak their voice in the handling of their affairs. These words on paper, called a "Constitution", would guarantee the great Navajo people the same right that many other tribes have: the right to protect and take part in the administration of your oil, your timber, your land, your sheep, and your resources. *Before Washington can give to the Navajo people these rights, the Navajo people must put in writing the rights and privileges that they want to have in the handling of their own affairs, and this statement of rights and privileges is called "Constitution."*

• • •

If you are satisfied and content to continue your present minor participation in the management of tribal resources, then you need not ask Washington for more powers, you need not draft a Constitution.

But, if you are interested in helping administer charity to those who need relief; if you are interested in seeing that all Navajos, either big or small, rich or poor, have equal rights; if you are interested in protecting your game, your wild-life, your coal, your timber, your oil, your range, and all these many things that you own as a tribe, you should write on a paper all of the privileges that you think should be given to the representatives of the Navajo people.

You should write down how these privileges should be carried out and how the tribal councilmen should be elected; and this paper would become your constitution, and you should send it to Washington and ask for the approval of the Secretary and the Commissioner.

• • •

Minutes of the Navajo Tribal Council, 11-13, held at Window Rock, Arizona, April 9, 1937. Although a draft of a proposed constitution was prepared by the constitutional assembly and submitted to the Secretary for approval, this draft of a constitution was never placed into effect in any

manner whatsoever.⁴ See generally *Navajo Yearbook* at 376-82; *A Political History* at 91-98, 106-108.

On July 26, 1938, the Secretary promulgated "Rules for the Tribal Council." The 1938 Rules provided only the barest framework for organization of Navajo tribal government. Although the Navajo Tribal Council was designated as the "governing body of the Navajo Tribe," the extent of its power was not described. *Navajo Yearbook* at 407-411. *Tribal government continued to function under the supervision and control of the Secretary.*⁵

The status of Navajo tribal government after rejection of the Indian Reorganization Act is illustrated by a statement made in 1948 before the Navajo Tribal Council by Mr. J. M. Stewart, then Superintendent, in response to an inquiry from a Council member on the powers of the Council (emphasis added):

Mr. Stewart: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation.

⁴ Commissioner Collier recommended secretarial approval of this constitutional assembly, justifying the ultimate result on the theory that the Navajo Tribal Council, as existing or as reorganized, would be an institution created by the Secretary with authorities derived from regulations promulgated by the Department of the Interior. Memorandum dated March 23, 1937, from Commissioner Collier to the Secretary of the Interior, cited in *Navajo Yearbook* at 381. Thus, even if the efforts of the constitutional assembly had been successful, the Tribal Council created thereby would have functioned under the supervision and control of the Secretary.

⁵ "[A]side from controlling personal relations, the Council has few powers of an autonomous governing body. Most action it takes is initiated by the government, and its functions are mainly to approve or disapprove government proposals or to advise with administrators, rather than to initiate policy or pass laws. Furthermore, any actions which it takes that are deemed not in the best interests of The People can be disapproved by the Secretary of the Interior. Thus the Council can bring pressure on administrators, but actual legislation and administration are still largely in the hands of the Indian Service. These limitations stem primarily from the tribal rejection of the Indian Reorganization Act in 1934 [sic]." Clyde Kluckhohn & Dortha Leighton, *The Navajo* 102 (1946).

but the legislation is not effective unless approved by the President, except under certain conditions. *And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs. . . .*

* * *

Now to answer Joe very directly. My personal feeling and understanding is that *the Navajo Tribal Council does not have the authority to demand. It has only the authority to request.*

Minutes of Proceedings of the Meeting of the Navajo Tribal Council, 29-30, held at Window Rock, Arizona, June 26-29, 1948.

The rejection of the Indian Reorganization Act by the Navajo people negated the existence of any congressional authorization for a procedure whereby the Navajo Tribe could free itself from complete supervision and control by the Secretary. In response to this situation, the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §631 *et seq.*, included an authorization for the Navajo people to adopt a tribal constitution by majority vote of adult members of the Tribe.

25 U.S.C. §636.⁶ The Navajo people have not adopted a constitution pursuant to this congressional authorization. As late as 1968, the Navajo Tribal Council formulated a constitution and adopted a resolution calling for its submission to the Navajo people for their approval, but no such action was ever taken and the perceived need for a tribal constitution remains unsatisfied. *Minutes of Sessions of the Navajo Tribal Council*, held at Window Rock, Arizona, November 14, 1968.

The 1938 Rules, with a number of amendments approved by the Secretary of the Interior, continue as the basis for the present Navajo tribal government. *Navajo Yearbook* at 384, 387; *A Political History* at 114. Thus, the 1938 Rules pertaining to tribal elections were revised on several occasions, and in each instance these revisions were submitted to the Secretary of the Interior for approval prior to their effectiveness. *Navajo Yearbook* at 387, 412, 419; *Plural Society* at 215-216.

Equally instructive is the manner in which the Navajo Tribe adopted its law and order code. On June 2, 1937, the Secretary of the Interior approved a law and order code applicable on Indian reservations. 25 C.F.R. Part 11 (1977).

⁶ Although the Navajo-Hopi Rehabilitation Act mentions the Navajo Tribal Council, 25 U.S.C. §§635, 636, 637, 638, the Act does not recognize any independent governmental power in the Navajo Tribal Council, either directly or by implication. Indeed, with the exception of provisions dealing with land, 25 U.S.C. §635, all other provisions of the Act recognize the continuing supervision of the Navajo Tribe by the Secretary of the Interior. Thus, although the Act authorized the Navajo Tribal Council to formulate a constitution, the constitution could be effective only after a vote of the Navajo people in a secret ballot election conducted under regulations prescribed by the Secretary. 25 U.S.C. §636. Similarly, although the Act authorized the Tribal Council to designate the manner of expenditure of tribal funds, such expenditure continued to require the approval of the Secretary. 25 U.S.C. §637. Finally, although the Act required that the Tribal Council be kept informed and afforded the opportunity to participate in the rehabilitation program authorized by the Act, the Secretary was directed to follow any recommendation of the Council only when "he deems them feasible and consistent with the objectives" of the Act. 25 U.S.C. §638.

For many years these regulations applied in full to the Navajo Tribe. At times relevant to this discussion, 25 C.F.R. §11.1 stated, in part, as follows:

(a) The regulations in this part relative to Courts of Indian Offenses shall apply to all Indian reservations on which such courts are maintained.

* * *

(d) The regulations in this part shall continue to apply to tribes organized under the [Indian Reorganization Act] until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective . . .

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

Because the members of the Navajo Tribe never adopted a constitution under the Indian Reorganization Act, the Navajo Tribe was unable to substitute its own law and order code pursuant to 25 C.F.R. §11.1(d). Nevertheless, the Navajo Tribe sought to assume responsibility for the administration of law and order on the Navajo Reservation pursuant to 25 C.F.R. §11.1(e).

On January 6, 1959, the Navajo Tribal Council adopted Resolution CJA-1-59, entitled "Adopting as tribal law the law and order regulations of the Department of the Interior on a temporary basis," which was approved by the Secretary of the Interior on February 11, 1959, and which stated, in part:

1. Pending the adoption by the Navajo Tribe and approval thereof by the Secretary of the Interior of a permanent law and order code, the law and order regulations of the Department of the Interior, 25 C.F.R., as modified, amended or amplified by ordinance and resolutions of the Navajo Tribal Council, heretofore approved by the Secretary of the Interior, are hereby adopted as tribal law, . . .

* * *

3. Except in Sections 11.1(e), 11.2(d) and 11.26, whenever the titles Secretary of the Interior, Commissioner of Indian Affairs, or Superintendent appear, the title Chairman of the Navajo Tribal Council is substituted therefor.

Section 1 of Resolution CJA-1-59 incorporated the law and order regulations of the Department of the Interior as modified, amended or amplified by resolutions of the Tribal Council *heretofore* approved by the Secretary. By specifically providing that the title "Secretary of the Interior" would remain in Section 11.1(e) after adoption of the federal regulations as tribal law, the Secretary reserved his authority to approval all *future* resolutions of the Tribal Council.⁷

B. The Navajo Tribe has Failed to Follow the Procedure, Twice Delineated by Congress, Necessary to Reduce Federal Control and to Exercise Powers of Self Government.

It is beyond dispute that both the Indian Reorganization Act of 1934, generally 25 U.S.C. §461 *et seq.*, and the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §631, *et seq.*, were intended by Congress, and viewed by the Secretary, as remedial measures enacted to foster tribal self-government by providing the means by which tribes, by adopting a constitution, could not only free themselves from absolute domination by the Department of the Interior, but also "stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, power." S. Rep. No. 1080, 73rd Cong., 2d Sess., 1 (1934).

⁷ In *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962) *cert denied*, 372 U.S. 908 (1963), the court held that approval of Resolution CJA-1-59 by the Secretary was a valid exercise of the Secretary's authority under 25 C.F.R. §11.1(e). The court's broad assertion that the action of the Secretary constituted his consent to the supersession of 25 C.F.R. Part 11, a correct statement insofar as pertinent to the decision in that case, clearly is incorrect to the extent it implies a complete relinquishment by the Secretary of his authority over future resolutions adopted by the Council, an implication clearly denied by Section 3 of Resolution CJA-1-59.

The opinion of the lower court makes a mockery of this congressional purpose.

In the Indian Reorganization Act, Congress established a procedure for Indian tribes to follow in order to free themselves from federal domination and control and to exercise powers of self government. In Section 6 of the Navajo-Hopi Rehabilitation Act, 25 U.S.C. §636, Congress specifically established the procedure for the Navajo Tribe to follow in order to achieve self-government. The reasoning of the Ninth Circuit makes both of these acts not only superfluous legislative exercises, but hypocritical acts which achieve the exact opposite of their stated purpose.

Under the lower court's reasoning, the only tribes that benefited from the Indian Reorganization Act were those tribes that refused to adopt a constitution as permitted by the Act; these tribes, and only these tribes, remain free from federal control. Under this reasoning, Indian tribes which adopted a constitution under the Indian Reorganization Act did not free themselves from federal domination but, rather, imposed upon themselves federal constraints that previously did not exist under the law. The lower court's message is clear: Indian tribes which elected to participate in an historic Indian law reform movement by adopting a constitution under the Indian Reorganization Act were duped by two branches of the federal government—legislative and executive—into *surrendering* rights under the guise that they were *acquiring* rights. For example, the Jicarilla Apache Tribe in *Merrion, supra*, which adopted a constitution authorizing the tribe to tax non-Indians only with the approval of the Secretary of the Interior, is viewed as giving away an aspect of its independence by doing so. Viewed from the historical perspective, the Ninth Circuit's analysis transforms the Indian Reorganization Act from an act which fostered Indian self-government to an act of Congressional deceit.

Neither the Indian Reorganization Act nor the Navajo-Hopi Rehabilitation Act requires the adoption of a constitution by any Indian tribe. Furthermore, neither the Indian

Reorganization Act nor the Navajo-Hopi Rehabilitation Act creates tribal sovereign powers. However, both of these Acts have been described as regulating "the manner and extent of the tribal power of self-government." See *United States v. Wheeler*, 435 U.S. 313, 328 (1978). The determination that these Acts neither *require* the adoption of a constitution nor *create* tribal sovereign powers does not compel the conclusion that Indian tribes may, without reference to the *procedure* set forth in these Acts, exercise unfettered powers of self-government, applicable to Indians and non-Indians alike, free of federal supervision and control. Indeed, the history of Navajo tribal government, particularly by reference to statements to the Navajo Tribal Council by the Commissioner of Indian Affairs and other federal officials, both before and after the adoption of the Indian Reorganization Act, compels the contrary conclusion. See Section II.A., of this Brief, *supra*.

C. The Ninth Circuit Has, in Effect, Created a Governmental Authority Authorized to Exercise the Inherent Sovereign Powers of the Navajo People Without Their Consent.

In the face of the Navajo Tribe's refusal to organize itself and to adopt a constitution, as permitted by Congress, the Ninth Circuit has taken it upon itself to appoint the Navajo Tribal Council as the tribal government by judicial fiat. The members of the Navajo Tribe, however, have never invested the Navajo Tribal Council with any governmental power. The Council began as, and continues to exist as, a creature of federal regulations.

The amici are unable to identify any event that transformed the Navajo Tribal Council from an agency created by federal regulations promulgated by the Secretary for the administrative convenience of the Department of the Interior into an agency empowered to exercise the sovereign powers of the Navajo people free of federal supervision and

control.⁸ The opinion of the Ninth Circuit necessarily is based upon the theory that a tribal government capable of exercising sovereign powers free of federal supervision and control can give birth to itself by evolution or public perception—a sort of political Darwinism—without congressional authorization. This theory is contrary to a fundamental principle of American jurisprudence: "In this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 (1979), *reh'g denied*, 441 U.S. 917 (1979).

The Ninth Circuit's unwarranted departure from the long-standing views of Congress and the Executive Branch regarding the supervisory powers of the Secretary of the Interior over ordinances adopted by the Navajo Tribal Council should be corrected by reversal of the Ninth Circuit's decision and reinstatement of the district court's judgment.

⁸ This Court has on occasion alluded to Navajo tribal government, but the Court has never addressed the fundamental issues presented by the writ of certiorari. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court noted that both the Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act authorized the Navajo Tribe to adopt a constitution for self-government, but there is no indication that the Court was aware that the Navajo people have never adopted a constitution under either statute. In *Williams v. Lee*, 358 U.S. 217 (1959), this Court pointed to the Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act as congressional encouragement for the formation of tribal government and found implicit in treaties between the Navajo Tribe and the United States "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed," *Id.*, 358 U.S. at 221-2, but the Court at no time gave recognition to the failure of the Navajo people to adopt a constitution pursuant to either of these statutes; the reference to "whatever tribal government existed" cannot be stretched, by any theory of the elasticity of the English language, to encompass a recognition by the Court that the Navajo Tribal Council may exercise the sovereign powers of the Navajo people free of federal supervision and control.

III. THE DECISIONS OF THIS COURT REQUIRE FEDERAL APPROVAL OF TRIBAL TAX ORDINANCES APPLICABLE TO NON-INDIANS

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court upheld a tax ordinance enacted by the Jicarilla Apache Tribe, and approved by the Secretary of the Interior, pursuant to a provision in the Tribe's constitution adopted under the Indian Reorganization Act with the approval of the Secretary.⁹ The adoption of a constitutional provision authorizing the tax before its imposition was viewed by the Court as "the critical event necessary to effectuate the tax." *Id.*, 455 U.S. at 148, n. 14 (emphasis in original). The Court recognized that a requirement of secretarial approval of tribal tax ordinances applicable to non-Indians served to "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies." *Id.*, 455 U.S. at 141. The Court referred to the two-stage approval process as "a series of federal check-points that must be cleared before a tribal tax can take effect" and a "process established by Congress to monitor such exercises of tribal authority." *Id.*, 455 U.S. at 155. The opinion of the lower court upholds tribal taxation of non-Indians without regard to secretarial approval and sanctions the imposition of tribal taxes on non-Indians

⁹ Unlike the members of the Jicarilla Apache Tribe, the Navajo people have never adopted a constitution vesting in the Navajo Tribal Council the right to exercise their sovereign powers. Furthermore, unlike the resolutions at issue in *Merrion*, the tax ordinances of the Navajo Tribal Council have never been approved by the Secretary of the Interior.

without the minimal protection afforded to the taxpayers in *Merrion*.¹⁰

The opinion of the Ninth Circuit is directly contrary to the prior decisions of this Court and should be reversed to rectify this unwarranted departure from existing precedent.

IV. CONCLUSION

The opinion of the Ninth Circuit raises critical policy issues affecting the exercise of powers of self-government by every Indian tribe in the United States. For an Indian tribe adopting a constitution under the Indian Reorganization Act, the opinion creates a clear incentive to rescind that constitution, thereby eliminating any requirement that tribal ordinances be approved by the Secretary of the Interior. For an Indian tribe not adopting a constitution under the Indian Reorganization Act, the opinion creates a clear disincentive to organize under Congressional authorization and gives rise to an atmosphere of lawlessness in which no person, Indian or non-Indian, is able to ascertain either the source of authority for the enactment of tribal ordinances or the existence of any limitations on the exercise of that authority.

¹⁰The *Merrion* decision's requirement of secretarial approval is consistent with all prior decisions of this Court, and all lower federal court decisions cited with approval by this Court, relative to tribal taxation of non-Indians. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), *reh'g denied*, 448 U.S. 911 (1980), tribal tax ordinances were approved by the Secretary of the Interior. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F., 947 (8th Cir. Indian Terr. 1905), *appeal dismissed*, 203 U.S. 599 (1906), the tribal enactment at issue was authorized by the Curtis Act of June 28, 1898, Ch. 517, 30 Stat. 495, which specifically provided that tribal enactments were not effective until approved by the President of the United States. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), and *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), the Oglala Sioux Tribe had implemented its sovereign taxing power by adoption of a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act.

Respectfully submitted this 21st day of November, 1984.

Robert B. Hoffman
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By/s/ ROBERT B. HOFFMAN
Robert B. Hoffman
Counsel for Amici Curiae
Arizona Public Service Company
and Southern California Edison
Company

No. 84-68

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents

AFFIDAVIT OF SERVICE

State of Arizona

ss

County of Maricopa

Robert B. Hoffman, being first duly sworn, deposes and says:

1. That he is an active member of the Bar in this Court and that he is an attorney for the amici curiae Arizona Public Service Company and Southern California Edison Company.

2. That the Brief of Amici Curiae to which this Certificate is attached has been served upon all counsel of record in accordance with the provision of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed this 21st day of November, 1984 to each of:

Alvin H. Shrago, Esq.
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Phoenix, Arizona 85004-3099

Elizabeth Bernstein, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, Arizona 86515

3. That the foregoing represents service on all parties required to be served under the provision of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, forty copies of this Brief of Amici Curiae were mailed first class postage prepaid properly addressed to the clerk of the United States on this 21st day of November 1984, which is within the time allowed for filing of this brief under the Rules and orders of this Court.

/s/ ROBERT B. HOFFMAN
Robert B. Hoffman

Subscribed and sworn before me this 21st day of November, 1984.

SEAL

/s/ JEANINE ZEC
Jeanine Zec
Notary Public

My Commission Expires:
June 9, 1987

1

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 84-68

In The
Supreme Court of the United States
October Term, 1984

KERR-McGEE CORPORATION,
Petitioner,
vs.

THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JULY 12, 1984
CERTIORARI GRANTED OCTOBER 9, 1984**

89pp

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RELEVANT DOCKET ENTRIES
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CAUSE NO. CIV 79-383 M

| <u>Docket No.</u> | <u>Description</u> |
|-------------------|--|
| 1. | Complaint (May 10, 1979) |
| 7. | Plaintiff's Memorandum In Support of Issuance of Preliminary Injunction (May 31, 1979) |
| 9. | Defendants' Motion to Dismiss (June 11, 1979) |
| 12. | Memorandum by Plaintiff In Opposition to Defendants' Motion to Dismiss (June 21, 1979) |
| 14. | Order, inter alia, Dismissing Navajo Tribe Of Indians And Navajo Tax Commission (September 27, 1979) |
| 15. | Responsive Memorandum By Navajo Defendants Opposing Injunctive Relief (November 1, 1979). |
| 19. | Stipulation Re: Uranium Mining Operations And Oil And Gas Operations (December 11, 1979) |
| 27. | Order Partially Transferring Venue (March 12, 1980) |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CAUSE NO. CIV. 80-247 PHX WPC

| <u>Docket No.</u> | <u>Description</u> |
|-------------------|--|
| 1. | Order Partially Transferring Venue (March 12, 1980) |
| 2. | Defendants' Motion for Summary Judgment with Memorandum and Statement of Facts (June 23, 1980) |
| 7. | First Amended Complaint (October 2, 1980) |
| 8. | Plaintiff's Response to Motion for Summary Judgment (October 20, 1980) |
| 9. | Plaintiff's Statement of Facts Pursuant to Local Rule 11(h) (October 20, 1980) |

12. Reply In Support of Navajo Defendants' Motion for Summary Judgment (November 10, 1980)
14. Stipulation and Order Staying Action (January 5, 1981)
17. Plaintiff's Motion for Summary Judgment (March 5, 1982)
18. Plaintiff's Statement of Facts in Support of Motion for Summary Judgment (March 5, 1982)
20. Defendants' Supplemental Memorandum and Response to Plaintiff's Motion for Summary Judgment (April 7, 1982)
21. Defendants' Statement of Facts Under Local Rule 11(i) In Opposition to Motion for Summary Judgment of Kerr-McGee (April 7, 1982)
23. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment (April 30, 1982)
- Hearing on pending motions for summary judgment (May 10, 1982)
24. Answer (May 10, 1982)
26. Memorandum Opinion and Order (June 29, 1982)
28. Defendants' Notice of Appeal (July 29, 1982)
30. Plaintiff's Notice of Cross-Appeal (August 13, 1982)
32. Plaintiff's Notice of Voluntary Dismissal re Count 10 and Order Thereon (August 23, 1982)
37. Judgment and Permanent Injunction (September 22, 1982)
38. Defendants' Amended Notice of Appeal (October 15, 1982)
39. Plaintiff's Amended Notice of Cross-Appeal (October 18, 1982)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NOS. 82-5725 AND 82-5736

| <u>Date</u> | <u>Description</u> |
|--------------------|---|
| September 25, 1982 | — Certificate of record |
| November 22, 1982 | — Opening Brief of Kerr-McGee Corporation |
| January 10, 1983 | — Opening Brief of Navajo Defendants |
| January 28, 1983 | — Amicus Curiae Brief of the United States |
| March 1, 1983 | — Reply/Answering Brief of Kerr-McGee Corporation |
| March 28, 1983 | — Reply Brief of Navajo Defendants |
| April 12, 1983 | — Order granting permission for the United States to participate in oral argument |
| April 15, 1983 | — Oral argument |
| April 15, 1983 | — Order that submission be deferred pending decision of the Tenth Circuit Court of Appeals in <i>Southland Royalty Co. v. Navajo Tribe</i> , No. 79-0140 (D.Utah) |
| September 8, 1983 | — Order submitting appeals for decision |
| September 28, 1983 | — Order permitting supplemental briefing |
| October 11, 1983 | — Supplemental Memorandum of Kerr-McGee Corporation |
| October 13, 1983 | — Supplemental Memorandum of the Navajo Tribe |
| April 17, 1984 | — Opinion of the Ninth Circuit Court of Appeals |
| April 17, 1984 | — Order as to Collateral Estoppel |
| April 17, 1984 | — Judgment of the Ninth Circuit Court of Appeals |

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CIV 80 247 WPC

KERR-McGEE CORPORATION, a Delaware corporation,
Plaintiff,

vs.

NAVAJO TRIBE OF INDIANS, a tribe of American Indians recognized by the United States Department of the Interior; NAVAJO TAX COMMISSION, an agency of the Navajo Tribe of Indians; PETER MacDONALD, individually and in his official capacity as Chairman of the Tribal Council of the Navajo Tribe of Indians; ROBERT SHORTY, JR., individually and in his official capacity as a member of the Navajo Tax Commission; GLENN GEORGE, individually and in his official capacity as a member of the Navajo Tax Commission; WILLIAM MORGAN, JR., individually and in his official capacity as a member of the Navajo Tax Commission; LAWRENCE WHITE, individually and as Director of the Navajo Tax Commission of the Navajo Tribe of Indians; CECIL D. ANDRUS, individually and in his official capacity as Secretary of the United States Department of the Interior,

Defendants.

FIRST AMENDED
COMPLAINT

(For Declaratory and Injunctive Relief)
(Filed Oct. 1980)

Plaintiff KERR-McGEE CORPORATION, by and through its undersigned attorneys, alleges and complains against Defendants as follows:

INTRODUCTORY STATEMENT

1.

This is an action by KERR-McGEE CORPORATION, which presently conducts oil and gas and mineral operations within the Navajo Indian Reservation ("Reservation") in both New Mexico and Arizona, for declaratory and injunctive relief against the NAVAJO TRIBE OF INDIANS, the NAVAJO TAX COMMISSION, and officials of the NAVAJO TRIBE OF INDIANS, and the Secretary of the United States Department of the Interior. Two Resolutions adopted by the Navajo Tribal Council purport to enact a Business Activity Tax and a Possessory Interest Tax. Both of these taxes purport to apply to Plaintiff and Plaintiff's operations on and under the Reservation, and purport to confer jurisdiction upon the tribal courts to adjudicate all controversies concerning the said taxes. Plaintiff seeks (1) a declaration that the Business Activity Tax and the Possessory Interest Tax are null, void, invalid, illegal and unenforceable against Plaintiff and that Defendants NAVAJO TRIBE OF INDIANS, NAVAJO TAX COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the

Possessory Interest Tax against Plaintiff; and (2) preliminary and permanent injunctions restraining Defendants NAVAJO TRIBE OF INDIANS, NAVAJO TAX COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE from enforcing the taxes or otherwise interfering in any way with Plaintiff's oil and gas and mineral operations on the Reservation; and (3) interlocutory and permanent injunctions enjoining Defendant CECIL D. ANDRUS affirmatively to restrain the NAVAJO TRIBE OF INDIANS from asserting or enforcing the Business Activity Tax and the Possessory Interest Tax and to restrain the NAVAJO TRIBE OF INDIANS from breaching Plaintiff's oil and gas and mineral leases.

PARTIES

2.

Plaintiff KERR-McGEE CORPORATION is a corporation created under the laws of the State of Delaware, is qualified to do business and is doing business in the States of New Mexico and Arizona.

3.

Defendant NAVAJO TRIBE OF INDIANS ("TRIBE") is a tribe of American Indians situated upon the Reservation in the States of Arizona, New Mexico and Utah.

4.

Defendant NAVAJO TAX COMMISSION ("COMMISSION") is an agency of the TRIBE created by the Tribal Council, which is the governing body of the TRIBE.

5.

Defendant PETER MacDONALD is the Chairman of the Tribal Council of the TRIBE and is its chief executive officer.

6.

Defendants ROBERT SHORTY, JR., GLENN GEORGE and WILLIAM MORGAN, JR., are the members of the COMMISSION. Defendant LAWRENCE WHITE is director of the COMMISSION.

7.

Defendant CECIL D. ANDRUS is the Secretary of the United States Department of the Interior ("Secretary").

8.

Defendants TRIBE and COMMISSION are sued under Counts I through IX of this Complaint. Defendants PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE are sued under the same Counts in their official capacities as officers of the TRIBE and in the alternative in their individual or personal capacities. The actions of Defendants PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE have been done and are threatened to be done under color of Navajo Tribal authority; such actions exceed the lawful authority of the TRIBE and, therefore, subject them personally and individually to the consequences of their individual conduct.

Defendant CECIL D. ANDRUS is sued under Court [sic] X of this Complaint in his official capacity as Secretary of the United States Department of the Interior and, alternatively, in his individual and personal capacity. The complained of action of CECIL D. ANDRUS, although done under color of authority of federal law, exceeds his lawful authority and, therefore, subjects him personally and individually to the consequences of his individual conduct.

JURISDICTION

All of Plaintiff's claims derive from a common nucleus of operative facts. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

Plaintiff's claims arise in the Districts of New Mexico and Arizona. Each and every Defendant has caused events to occur and is threatening to cause events to occur in the States of New Mexico and Arizona out of which Plaintiff's claims herein against Defendants arise.

Plaintiff's claims in Counts I and II arise under the laws and treaties of the United States, including the federal law of Indian relations and the Treaty of June 1, 1868, 15 Stat. 667; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Counts III and IX arise under the Constitution and laws of the United States, including the federal law of Indian relations, 25 U.S.C. § 476, 25 U.S.C. § 636, 25 U.S.C. § 396d, 25 U.S.C. § 398e, 25 C.F.R. Part 171, U.S. Constitution, Art. I, § 8 and Art. VI, cl. 2; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1337 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Count IV arise under the laws of the United States, including the federal law of Indian relations and 25 U.S.C. § 396a *et seq.*; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1337 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Counts V, VI, and VII arise under the Constitution and laws of the United States, including the federal law of Indian relations and the U.S. Constitution, Art. I, § 8 and Art. VI, cl. 2; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Count VIII arise under the Constitution and laws of the United States, including the federal law of Indian relations, the Indian Civil Rights Act of 1968 (25 U.S.C. § 1301 *et seq.*) and the U.S. Constitution, Fifth Amendment; this Court has jurisdiction over said

claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1343(4) and under the doctrine of pendent jurisdiction.

17.

Plaintiff's claims in Count X arise under the laws of the United States, including the federal law of Indian relations, 25 U.S.C. § 476, 25 U.S.C. § 636, and 25 U.S.C. § 396d; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1361 and under the doctrine of pendent jurisdiction.

GENERAL ALLEGATIONS

18.

The TRIBE is a tribe of American Indians situated upon a reservation created in part by treaty and in part by executive order in the States of Arizona, New Mexico and Utah. The TRIBE has never adopted and presently does not possess any written constitution, but its self-governing powers are ostensibly vested in the Navajo Tribal Council ("Tribal Council"). The Tribal Council is the supreme tier of tribal government, and all agencies of the TRIBE, including its courts, are subject and subservient thereto.

19.

The COMMISSION, of which Defendants ROBERT SHORTY, JR., GLENN GEORGE and WILLIAM MORGAN, JR. are members and Defendant LAWRENCE WHITE is director, is an agency of the TRIBE charged by the Tribal Council with the responsibility of interpreting, applying and enforcing the Possessory Interest Tax and the Business Activity Tax.

20.

On or about January 27, 1978 and April 28, 1978, the Tribal Council adopted Resolutions CJA-13-78 and CAP-36-78 respectively (attached hereto as Exhibits A and B) by virtue of which the Possessory Interest Tax and the Business Activity Tax were enacted. The Business Activity Tax purports to require Plaintiff (1) to file declarations of tax due on May 15, August 15, November 15 and February 15 of each calendar year, (2) to pay taxes purportedly due on the said dates and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax purports to be effective as of July 1, 1978, and purports to apply to every sale, either within or without the Reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%), which rate is presently set at five percent (5%). The Possessory Interest Tax purports to require Plaintiff (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one-half (1/2) due on February 15 and one-half (1/2) due on August 15 of each calendar year. The Possessory Interest Tax purports to apply to every leasehold interest on or under the Reservation that has a value in excess of \$100,000 at a rate of not less than one percent (1%) nor greater than ten percent (10%), which rate is presently set at three percent (3%). Both the Business Activity Tax and the Possessory Interest Tax purport to empower the COMMISSION to subject Plaintiff to a number of penalties in the event of non-compliance, including "permanent loss of all rights

to engage in productive activity" on or under the Reservation. Neither of the resolutions purporting to enact said taxes has been approved or disapproved by the Secretary of the United States Department of the Interior.

21.

Plaintiff currently engages in uranium mining operations on certain portions of the Reservation situated in the State of New Mexico pursuant to the following mineral leases:

- (1) Contract No. 14-20-0603-9988, dated June 21, 1966;
- (2) Contract No. 14-20-0603-9990, dated June 21, 1966;
- (3) Contract No. 14-20-0603-9987, dated June 21, 1966;
- (4) Contract No. NOO-C-14-20-3894, dated June 21, 1971;
- (5) Contract No. NOO-C-14-20-3895, dated June 21, 1971; and
- (6) Contract No. NOO-C-14-20-3986, dated June 21, 1971.

22.

The aforesaid mineral leases, after having been approved by the Tribal Council, were all duly issued to Plaintiff by the Secretary of the United States Department of the Interior pursuant to 25 U.S.C.A. § 396a. The said leases are all presently valid and binding upon Plaintiff on the one hand and the TRIBE and the United States on the other hand.

23.

Plaintiff currently engages in oil and gas operations on certain portions of the Reservation situated in the State of Arizona pursuant to the following oil and gas leases:

- (1) Contract No. 14-20-0603-8822, dated October 9, 1964;
- (2) Contract No. 14-20-0603-8823, dated October 9, 1964;
- (3) Contract No. 14-20-0603-8824, dated October 12, 1964;
- (4) Contract No. 14-20-0603-8888, dated January 15, 1965; and
- (5) Contract No. 14-20-0603-8889, dated January 15, 1965.

24.

The aforesaid oil and gas leases, after having been approved by the Tribal Council, were all duly issued to Plaintiff by the Secretary of the United States Department of the Interior pursuant to 25 U.S.C.A. § 396a. The said leases are all valid and binding upon Plaintiff on the one hand and the TRIBE and the United States on the other hand.

25.

In reliance upon the validity and enforceability of the aforesaid oil and gas and mineral leases, Plaintiff has made extensive improvements and commitments of resources and has undertaken substantial development under its oil and gas and mineral leases at a significant cost to Plaintiff.

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26.

Plaintiff has paid in excess of \$1,843,000 in rentals and royalties to the TRIBE through March of 1979 in connection with its mineral operations which began production in 1976. Plaintiff has paid a total of \$111,377 in rentals and a total of \$7,539,490 in royalties to the TRIBE in connection with its oil and gas operations from February, 1967, through March, 1979.

27.

Plaintiff employs in connection with its mining operations on the Reservation a work force of approximately 394, of which 257 are Navajo Indians. Indian employees comprise approximately sixty percent (60%) of Plaintiff's work force in connection with said operations.

CLAIMS FOR RELIEF

COUNT I.

(Lack of Inherent Power)

28.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

29.

Through the Navajo Tribal Council, the TRIBE exercises powers of self-government over its members.

30.

The powers of self-government which the TRIBE exercises are limited to those powers which the Congress of

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the United States has not expressly terminated and which are not inconsistent with its dependent status.

31.

The dependent status of the TRIBE is such that whatever power it may once have had to determine independently external relations between the TRIBE and its members on the one hand and non-members on the other hand has been extinguished.

32.

The TRIBE has no criminal or civil jurisdiction over non-Indians and non-members thereof, and the TRIBE has no power to tax non-Indians and non-members thereof.

33.

Plaintiff is neither an Indian nor a member of the TRIBE.

34.

The Business Activity Tax and the Possessory Interest Tax purport to apply to Plaintiff and purport to empower the TRIBE to suspend permanently Plaintiff's right to engage in oil and gas and mineral operations on and under the Reservation in the event of non-compliance with the said taxes. Such penalties are criminal or quasi-criminal in nature. The TRIBE does not have criminal or quasi-criminal jurisdiction over non-members or non-Indians.

35.

Plaintiff is not a trespasser, but instead is entitled to be present on and remain on the Reservation pursuant to

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the aforementioned valid and binding oil and gas and mineral leases.

36.

The TRIBE cannot unilaterally suspend Plaintiff's right to engage in oil and gas and mineral operations on and under the Reservation.

37.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax represent tribal efforts to determine independently tribal relations with a non-Indian and non-member which has a legal right to engage in oil and gas and mineral operations on and under the Reservation.

38.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax are null, void, invalid, illegal and unenforceable.

39.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT II.

(Treaty Limitations on Tribal Power)

40.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

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41.

The TRIBE and the United States entered into the Treaty of June 1, 1868, 15 Stat. 667 ("Treaty").

42.

The Treaty is presently in effect and valid and binding upon the TRIBE.

43.

The Treaty prohibits the TRIBE from opposing the construction and operation of works of utility or necessity permitted by the laws of the United States.

44.

Plaintiff's oil and gas and mineral operations constitute "other work[s] of utility or necessity . . . permitted by the laws of the United States" within the purview of the Treaty.

45.

The Business Activity Tax and the Possessory Interest Tax, as applied to Plaintiff, constitute an opposition prohibited by the Treaty.

46.

The Treaty vests in the United States exclusive criminal and civil authority and jurisdiction over non-Indians and non-members.

47.

The Treaty prohibits the TRIBE from asserting criminal and civil authority and jurisdiction over non-Indians and non-members of the TRIBE.

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48.

Plaintiff is neither an Indian nor a member of the
TRIBE.

49.

Plaintiff is not a trespasser, but instead is entitled
to be present on and remain on the Reservation pursuant
to the aforementioned valid and binding oil and gas min-
eral leases.

50.

As applied to Plaintiff, the Business Activity Tax
and the Possessory Interest Tax constitute an assertion
of tribal criminal and civil authority and jurisdiction over
a non-Indian and non-member in violation of the Treaty.

51.

As applied to Plaintiff, the Business Activity Tax and
the Possessory Interest Tax are null, void, illegal, invalid
and unenforceable.

52.

Defendants TRIBE, COMMISSION, PETER Mac-
DONALD, ROBERT SHORTY, JR., GLENN GEORGE,
WILLIAM MORGAN, JR. and LAWRENCE WHITE
cannot legally enforce the Business Activity Tax and the
Possessory Interest Tax against Plaintiff.

COUNT III.

(Federal Pre-emption of Regulation
of Operations Under Oil and Gas
and Mineral Leases)

53.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

54.

The Congress of the United States possesses full, complete and plenary power over the TRIBE and its relations with non-Indians and non-members of the TRIBE.

55.

The Congress of the United States has provided for an extensive, all-inclusive and comprehensive statutory scheme by which oil and gas and mineral leases on Indian reservations, including the Reservation, are to be issued and maintained. The Congress of the United States has expressly provided that all operations under oil and gas and mineral leases on Indian reservations, including the Reservation, shall be subject to rules and regulations promulgated by the Secretary of the Interior.

56.

Pursuant to congressional mandate, the Secretary of the Interior has promulgated an extensive, all-inclusive and comprehensive set of rules and regulations to which the issuance of and operations under the oil and gas and mineral leases of Plaintiff are solely and exclusively subject.

57.

Neither the leases, statutes nor the regulations permit unilateral control of any kind by the TRIBE or any mem-

ber thereof over Plaintiff or over Plaintiff's operations under the aforementioned oil and gas and mineral leases.

58.

The Business Activity Tax and the Possessory Interest Tax, to the extent they may be applied to Plaintiff and Plaintiff's operations under the aforementioned oil and gas and mineral leases, are inconsistent with and unduly conflict with the federal legislation and regulation governing issuance of and operations under said leases.

59.

All of Plaintiff's mineral leases are on portions of the Reservation which were created by executive order. The Congress of the United States has conferred upon the States of Arizona and New Mexico the sole and exclusive right to levy and collect taxes upon the

"improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations. . . ."

60.

The Congress of the United States has pre-empted whatever power and authority the TRIBE might otherwise have had to apply the Business Activity Tax and the Possessory Interest Tax to Plaintiff and to its property and operations on the Reservation.

61.

As applied to Plaintiff and to its property and operations on the Reservation, the Business Activity Tax and

the Possessory Interest Tax are void, null, invalid, illegal and unenforceable.

62.

Defendants TRIBE, COMMISSION, PETER MACDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff or its operations.

COUNT IV.

(Breach of Contract)

63.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

64.

The aforementioned oil and gas leases all provide for the following rental and royalty:

" . . . a rental of \$1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 16 2/3 percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free."

The foregoing rental and royalty provisions are valid and binding upon Plaintiff, the TRIBE and the United States.

65.

The TRIBE, the United States and Plaintiff agreed that the foregoing rentals and royalties would be the sole and exclusive monetary compensation to the TRIBE and the United States in consideration for Plaintiff's operations under the aforementioned oil and gas leases.

66.

The TRIBE, the United States and Plaintiff agreed that the foregoing rentals and royalties on the aforementioned oil and gas leases could not be changed or modified without Plaintiff's consent.

67.

The aforementioned mineral leases all provide for various rates of rentals and royalties which are valid and binding upon Plaintiff, the TRIBE and the United States.

68.

The TRIBE, the United States and Plaintiff agreed that the various rentals and royalties would be the sole and exclusive monetary compensation to the TRIBE and the United States in consideration for Plaintiff's operations under the aforementioned mineral leases.

69.

The TRIBE, the United States and Plaintiff agreed that the various rentals and royalties on the aforementioned mineral leases could not be changed or modified without Plaintiff's consent.

70.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax effect a unilateral modification in the rates of rental and royalty in the aforementioned oil and gas and mineral leases, to which Plaintiff has not consented.

71.

The said unilateral modification constitutes a breach of the aforementioned oil and gas and mineral leases by virtue of which Plaintiff, the TRIBE and the United States all agreed upon acceptable and binding rates of rental and royalty.

72.

In the aforementioned oil and gas and mineral leases, the United States and the TRIBE covenanted that Plaintiff would be entitled to the quiet and peaceable enjoyment of the demised premises. The Business Activity Tax and the Possessory Interest Tax purport to provide for permanent suspension of Plaintiff's rights to engage in oil and gas and mineral operations on and under the Reservation, as well as other penalties, in the event of non-compliance therewith. Enforcement of the said penalties will constitute a violation of Plaintiff's right to enjoy the demised premises in a quiet and peaceable manner.

73.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT V.

74.

(The Commerce Clause)

(Privilege of Engaging in Interstate Commerce)

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

75.

Article I, Section 8 of the United States Constitution grants to the Congress of the United States the exclusive power to regulate commerce among the several states and with the Indian tribes ("Commerce"). As a result of this grant of exclusive power to the Congress, states and Indian tribes, including the TRIBE, are precluded from imposing any tax on the privilege of engaging in Commerce.

76.

Plaintiff is engaged in the production and shipment from the Reservation of oil and gas and minerals to surrounding states, and its oil and gas and mineral operations on and under the Reservation are an integral and inseparable part of the flow of Commerce.

77.

The Business Activity Tax is a tax on all sales made by Plaintiff within or without the Reservation of "Navajo goods or services." It is not related in any way to any benefits provided to Plaintiff by the TRIBE.

78.

The Business Activity Tax is unconstitutional on its face and as applied to Plaintiff because it creates a tax on the privilege of engaging in Commerce.

79.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax against Plaintiff.

COUNT VI.

(The Commerce Clause)

(Discrimination Against Interstate Commerce)

80.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

81.

As a result of the constitutional grant to the Congress of the United States of exclusive power to regulate Commerce, states and Indian tribes, including the TRIBE, are prohibited from imposing any tax which discriminates against Commerce.

82.

The Possessory Interest Tax and the Business Activity Tax provide a direct commercial advantage to local business. The taxes exempt from taxation the enterprises,

activities and possessory interests of the TRIBE. With few exceptions Reservation land is communally owned, and, therefore, few, if any, Navajo Indians own leaseholds in real property subject to the Possessory Interest Tax. The Possessory Interest Tax exempts from taxation those possessory interests valued at less than \$100,000. Few, if any, Navajo Indians own leaseholds in real property with values of \$100,000 or more. Persons engaging in "traditional activities" are exempt from taxation under the Business Activity Tax. Few, if any, persons other than Navajo Indians are engaged in traditional activities on the Reservation.

83.

The Possessory Interest Tax and the Business Activity Tax are unconstitutional on their face and as applied to Plaintiff in that they create a tax which discriminates against Commerce.

84.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT VII.
(The Commerce Clause)
(Multiple Taxation)

85.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

86.

As a result of the Constitutional grant to the Congress of the United States of exclusive power to regulate Commerce, states and Indian tribes, including the TRIBE, are precluded from imposing any tax which subjects Commerce to multiple taxation.

87.

Plaintiff sells oil and gas and minerals in Commerce, and Plaintiff's operations on and under the Reservation are an integral part of the flow of Commerce.

88.

Plaintiff is subject to taxation by various states, including Arizona and New Mexico, for the same oil and gas and mineral sales to which the Business Activity Tax purports to apply.

89.

The Business Activity Tax is unconstitutional on its face and as applied to Plaintiff because it creates a multiple tax, without allocation, on Plaintiff's sales in Commerce.

90.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax against Plaintiff.

COUNT VIII.

(Due Process and Equal Protection)

91.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

92.

The Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, prohibits any Indian tribe, including the TRIBE, from taking the property of any person or depriving any person, including Plaintiff, of liberty or property without just compensation and due process of law and from denying any person, including Plaintiff, within its jurisdiction equal protection of its laws.

93.

The Fifth Amendment of the Constitution of the United States prohibits any Indian Tribe, including the TRIBE, from taking the property of any non-member or depriving any non-member, including Plaintiff, of liberty or property without compensation and due process of law, and from denying any non-member, including Plaintiff, within its jurisdiction equal protection of the law.

94.

Plaintiff is neither an Indian nor a member of the TRIBE, and is excluded by federal law and tribal law from voting or otherwise participating in the tribal decision-making process on the grounds of race and ethnic character.

95.

Plaintiff's aforementioned oil and gas and mineral leases confer contract, property and liberty rights upon

the Plaintiff, including specific and limited rental and royalty rates.

96.

The Possessory Interest Tax and the Business Activity Tax are void and invalid on their face and as applied to Plaintiff because they effect a taking of Plaintiff's contract, property and liberty rights without just compensation and deny Plaintiff's equal protection rights in violation of the Indian Civil Rights Act and the Fifth Amendment of the Constitution of the United States.

97.

The Business Activity Tax and the Possessory Interest Tax exempt from taxation the enterprises, activities and possessory interests of the TRIBE. With few exceptions, Reservation land is communally owned, and, therefore, few, if any, Navajo Indians own leaseholds in real property subject to the Possessory Interest Tax. The Possessory Interest Tax exempts from taxation those possessory interests valued at less than \$100,000. Few, if any, Navajo Indians own leaseholds in real property with values of \$100,000 or more. Persons engaging in "traditional activities" are exempt from taxation under the Business Activity Tax. Few, if any, persons other than Navajo Indians are engaged in traditional activities on the Reservation.

98.

The Business Activity Tax and the Possessory Interest Tax were enacted with the actual intent and purpose to subject the sales and possessory interests of only non-Indians such as Plaintiff to taxation. The effect of the

Business Activity Tax and the Possessory Interest Tax is to subject the sales and possessory interests of only non-Indians such as Plaintiff to taxation. There is no compelling tribal interest to justify the creation of such a racial classification.

99.

The Possessory Interest Tax and the Business Activity Tax are void and invalid on their face and as applied to Plaintiff because they subject Plaintiff to taxation without representation and, because they are arbitrary, vague and confiscatory, contrary to the due process requirements of the Indian Civil Rights Act and the Fifth Amendment of the Constitution of the United States.

100.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT IX.

(Lack of Approval by the Secretary of the Interior)

101.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

102.

Approval by the SECRETARY is required as a condition precedent to the effectiveness and validity of any

tribal constitution or by-laws vesting governmental powers in any tribe. Approval by the SECRETARY is also required as a condition precedent to the validity of any tribal ordinance or resolution, particularly in the absence of an approved constitution.

103.

The TRIBE has never adopted and the SECRETARY has never approved any constitution. Nor have resolutions CJA-13-78 and CAP-36-78 been approved by the SECRETARY.

104.

The TRIBE lacks authority or power to assert or enforce the Business Activity Tax or the Possessory Interest Tax against Plaintiff or Plaintiff's property without approval by the SECRETARY. Any attempt by the TRIBE to assert or to enforce the Business Activity Tax or the Possessory Interest Tax against Plaintiff or Plaintiff's property without approval by the SECRETARY is unlawful and illegal.

105.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax are null, void, illegal, invalid and unenforceable.

106.

Defendants TRIBE, COMMISSION, PETER MACDONALD, ROBERT SHORTY, JR., GLEN GEORGE, WILLIAM MORGAN, JR., and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff or Plaintiff's property.

COUNT X.

(Duty of Secretary of the Interior)

107.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

108.

The Congress of the United States has expressly provided in 25 U.S.C. § 396(d) that:

"All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior."

109.

The SECRETARY has a mandatory and non-discretionary duty and obligation to ensure that "all operations under any oil, gas, or other mineral lease," are subject only to the rules and regulations promulgated by the SECRETARY and are not subjected to tribal ordinances, resolutions or other actions that lack approval by the SECRETARY.

110.

The Business Activity Tax and the Possessory Interest Tax purport to subject Plaintiff's operations under its oil and gas and mineral leases to tribal ordinances and regulations that lack approval by the SECRETARY and

that constitute rules and regulations other than those promulgated by the SECRETARY.

111.

The SECRETARY has a mandatory and non-discretionary duty and obligation to ensure that Plaintiff's oil and gas and mineral leases are not breached by the TRIBE by asserting or enforcing the Business Activity Tax or Possessory Interest Tax.

112.

The SECRETARY has not delegated any portion of his authority to the Navajo defendants and has refused to approve the Business Activity Tax and the Possessory Interest Tax and, therefore, cannot legally allow the Business Activity Tax and the Possessory Interest Tax to be enforced against Plaintiff.

IMMINENT HARM AND IRREPARABLE INJURY

113.

The Business Activity Tax was enacted by the Tribal Council on or about April 28, 1978, but purports to have become effective as of July 1, 1978. The Possessory Interest Tax was enacted by the Tribal Council on or about January 26, 1978, but purports to have become effective as of January 1, 1978.

114.

The Business Activity Tax and the Possessory Interest Tax purport to authorize the COMMISSION to suspend the rights of any person, including Plaintiff, who

fails to file a declaration of tax, to engage in productive activity on or under the Reservation. The said taxes further purport to empower the COMMISSION to attach and seize the assets of any taxable person, including Plaintiff.

115.

The Business Activity Tax and the Possessory Interest Tax have a direct and immediate impact upon Plaintiff, inasmuch as they place Plaintiff in the dilemma of either paying funds which may never be recovered in the event said taxes are ultimately declared illegal and unenforceable or risking the threat of attachment and seizure of all of Plaintiff's oil and gas and mineral operations, as well as loss of Plaintiff's rights to engage in productive activity on and under the Reservation. The taxes purportedly due under the Business Activities Tax are due on a date forty-five (45) days after formal adoption by the COMMISSION of the final rules and regulations thereunder.

116.

Plaintiff has no adequate remedy at law. Unless the Defendants are preliminarily and permanently restrained by this Court from applying and enforcing the Business Activity Tax and the Possessory Interest Tax to and against Plaintiff, they will continue to harm Plaintiff irreparably as hereinabove alleged.

WHEREFORE, Plaintiff prays for relief as follows:

(1) For a declaratory judgment pursuant to 28 U.S.C. § 2201 against the TRIBE, the COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN

GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE, and each of them, declaring that the Business Activity Tax and the Possessory Interest Tax are null, void, illegal, invalid and unenforceable against Plaintiff;

(2) For a declaratory judgment pursuant to 28 U.S.C. § 2201 against the SECRETARY declaring that said Defendant has a mandatory and non-discretionary duty and obligation to ensure that all operations under Plaintiff's oil and gas and mineral leases are subject only to the rules and regulations promulgated by the SECRETARY and are not subject to the Business Activity Tax and the Possessory Interest Tax, or either of them, which lack approval by the SECRETARY.

(3) For a declaratory judgment pursuant to 28 U.S.C. § 2201 against the SECRETARY declaring that said Defendant has a mandatory and non-discretionary duty and obligation to ensure that Plaintiff's oil and gas and mineral leases are not breached by the TRIBE's asserting or enforcing the Business Activity Tax and the Possessory Interest Tax.

(4) For a preliminary injunction and a permanent injunction against the TRIBE, the COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE as well as their successors, restraining and enjoining them as follows:

(a) From applying, enforcing or attempting to enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff;

(b) From levying, collecting, attempting to assess or attempting to collect against or from Plaintiff any and all taxes enacted by the TRIBE;

(c) From initiating, accepting for filing or conducting any legal proceeding against Plaintiff in any and all tribal court(s); from seeking or issuing any order to show cause restraining order or injunction, whether interlocutory or final, judgment or other process or order of any nature from any such court based upon or arising out of the Business Activity Tax or the Possessory Interest Tax or both or Plaintiff's operations under its aforementioned oil and gas and mineral leases;

(d) From interfering with, obstructing, impairing, or hampering the conduct or operation of any of Plaintiff's facilities or other facilities related to, supportive of or incidental to Plaintiff's operations under its aforementioned oil and gas and mineral leases;

(e) From attaching and seizing Plaintiff's assets and from denying Plaintiff, its officers, employees, or its suppliers, contractors or other licensees or invitees ingress to and egress from its operations under the aforementioned oil and gas and mineral leases; and

(f) From otherwise attempting or purporting to regulate, tax or assert governmental authority over Plaintiff;

(5) For a mandatory injunction against the SECRETARY affirmatively to restrain the TRIBE from asserting or enforcing the Business Activity Tax and the Pos-

sessory Interest Tax, or either of them, against Plaintiff, prior to approval of such taxes by the SECRETARY.

(6) For a mandatory injunction against the SECRETARY enjoining the SECRETARY affirmatively to restrain the TRIBE from breaching Plaintiff's oil and gas and mineral leases by asserting or enforcing the Business Activity Tax and the Possessory Interest Tax.

(7) For Plaintiff's costs herein and for interest thereon at the rate of six percent (6%) per annum until paid; and

(8) For such other and further relief against the Defendants, and each of them, as is fair, just and equitable in the premises.

DATED this 30th day of September, 1980.

Evans, Kitchel & Jenckes, P.C.
By /s/ Fred E. Ferguson, Jr.
F. Pendleton Gaines, III
Alvin H. Shrago
363 North First Avenue
Phoenix, Arizona 85003

and

Campbell & Black, P.A.
Post Office Box 2208
Santa Fe, New Mexico 87501
Attorneys for Plaintiff
Kerr-McGee Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff's First Amended Complaint was mailed this 2d day of October, 1980, to:

Clayburgh, Ashby, Rose & Paskind, P.A.
618 Manzano, N.E.
Albuquerque, New Mexico 87110

Vlassis & Ruzow
1545 West Thomas Road
Phoenix, Arizona 85015

/s/ Alvin H. Shrago

EXHIBIT A

CJA-13-78
Class "A" Resolution
Washington Approval
Required.

RESOLUTION OF THE NAVAJO TRIBAL COUNCIL Enacting the Navajo Possessory Interest Tax

WHEREAS:

1. The right to tax is part of the inherent sovereignty of any Nation; and
2. Navajo revenues from royalties and other traditional sources of income are depleting both in terms of nominal and constant dollars; and
3. Navajo population and Navajo needs are increasing, with the increase in the need for services partly a result of increased employment and development within the Navajo Nation; and
4. Like all other governments, it is appropriate for the Navajo Nation to call upon those possessing wealth within the Navajo Nation to share in the costs of providing governmental services to the residents of the Navajo Nation; and

5. By Navajo Tribal Council Resolution CJA-6-74 of January 10, 1974, the Navajo Tax Commission was created and it has made its initial reports to this Council and recommended the imposition of taxes on wealth and economic activity within the Navajo Nation; and

6. The Navajo Tax Commission has developed a proposed "Possessory Interest Tax" attached hereto as Exhibit "A", which recommends it be enacted into law by the Navajo Tribal Council.

NOW THEREFORE BE IT RESOLVED THAT:

1. The "Possessory Interest Tax" attached hereto as Exhibit "A" is hereby approved.
2. The Navajo Tax Commission is empowered to administer this tax.
3. The Courts of the Navajo Nation are vested with jurisdiction:
 - a) over any and all persons subject to this resolution.
 - b) to hear and determine any challenge to the validity of this resolution, either generally, or as applied to any person.
4. All resolutions or parts of resolutions (or attachments thereto) which are inconsistent with the provision of this resolution are hereby repealed, including, without limitation, any resolution purporting to waive any right of taxation by the Navajo Nation.
5. This resolution shall become effective January 01, 1978 after approval by the Navajo Tribal Council.
6. If any provision of this resolution or the Navajo Possessory Interest Tax or its application to any person

or circumstance is held invalid by a final judgment of a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of the tax which can be given effect without the invalid provision or application, and to this end the provisions of this resolution and the Navajo Possessory Interest Tax are severable.

7. During the pendency of any litigation or arbitration concerning the validity of this resolution, the Controller of the Navajo Nation is authorized and directed to place all payments made to the Navajo Nation pursuant to this resolution in interest-bearing obligations of the United States or interest-bearing accounts insured by an agency of the United States.

Following the termination of any such litigation or arbitration (and the conclusions of any appeals), and subject to any Order by any Court or Arbitrator rendering a decision or judgment therein, the Controller of the Navajo Nation shall remit to the prevailing party or parties any and all sums collected, together with the interest earned thereon. The Controller of the Navajo Nation is further directed to keep all such funds separate and apart from other funds under his supervisions and control.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 35 in favor and 13 opposed, this 26th day of January, 1978.

/s/ Wilson C. Skut
Vice Chairman
Navajo Tribal Council

EXHIBIT "A" POSSESSORY INTEREST TAX

PART A: INTRODUCTION

SECTION 1. PREAMBLE.

The Possessory Interest Tax is designed to require those possessing wealth within the Navajo Nation to contribute to the cost of providing governmental services to the residents of the Navajo Nation. Because the Possessory Interest Tax focuses on the sources of wealth within the Navajo Nation created in part by the activities of the government of the Navajo Nation, the tax will, in large be paid by the beneficiaries of those activities.

SECTION 2. NAME

This Act shall be called the Possessory Interest Tax.

PART B: OPERATIVE RULES

SECTION 3. DEFINITIONS.

Subject to additional definitions contained in subsequent sections, and unless the context otherwise requires, in this Act.

(a) *Possessory Interest.* For the purposes of this Act, a "possessory interest" is the value of a lease granted by the Navajo Nation. The tax is not on improvements but, rather, on the value of the lease site and underlying resources such as coal, oil, gas, and uranium.

(b) *Taxable Persons.* A "taxable person" is any person having ownership rights in any possessory interest within the Navajo Nation.

(c) *Fraud*. "Fraud" has the same meaning as that established in the interpretation of Section 7206 of Title 26 of the United States Code.

(d) *Commission*. "Commission" means the Navajo Tax Commission.

SECTION 4. COMPUTATION OF TAX.

The tax due under this Act is the value of the possessory interest as determined by the Navajo Tax Commission, multiplied by the tax rate established in Section 7.

SECTION 5. COMPUTATION OF VALUE OF POSSESSORY INTERESTS.

The value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Navajo Tax Commission which accurately reflects the fair market value of the possessory interest in question.

(a) *Fair Market Value Method*. The value of a possessory interest may be computed by comparing the interest to be valued with comparable interests (whether within or without the Navajo Nation) which are sold by willing sellers or willing buyers, neither of whom are under a compulsion to act; or

(b) *Present Value of Income to be Received*. The value of a possessory interest may be computed by capitalizing the value of the gross income from the property and subtracting them from the capitalized value of the reasonable expenses to be incurred. Such capitalization shall be done for the life of the possessory interest in question.

(i) With respect to possessory interests whose term is indefinite, the term of the possessory interest shall be presumed to be 25 years.

SECTION 6. EXEMPTIONS AND DEDUCTIONS.

(a) Exemptions.

(i) No possessory interests with value less than \$100,000 shall be subject to this tax; *provided, however*, that all possessory interests owned by a taxable person within the Navajo Nation shall be combined to determine the eligibility of said taxable person for this exemption.

(ii) Nothing within this Act shall be construed as imposing a tax on the government of the Navajo Nation or on any wholly owned subdivision or enterprise of the government of the Navajo Nation, nor requiring the filing of any Designation, Declaration, or other report by such party.

(b) *Deductions*. In computing the present value of income to be received pursuant to Section 5(b) of this Act, deductions from gross income shall be permitted for reasonable expenses as set forth in the regulations of the Commission.

SECTION 7. RATE OF TAX.

A tax is assessed on possessory interests within the Navajo Nation at a rate established or to be established in regulations of the Commission. The rate will be no less than one percent (1%), nor greater than ten percent (10%), and until some other rate is established by the Commission, the tax rate shall be three percent (3%).

SECTION 8. PERIOD OF TAX.

The tax under this Act shall be assessed annually based upon the value of possessory interest within the Navajo Nation on January 1st of each year.

SECTION 9. FILING OF TAX DECLARATION.

Every non-exempt taxable person within the Navajo Nation shall designate some natural person as the individual empowered by the taxable person to act on behalf of the taxable person with respect to all matters involving this Act.

SECTION 10. PAYMENT OF TAX.

The possessory interest tax shall be paid in two installments, one-half ($\frac{1}{2}$) being due on or before August 15th of each year and the other one-half ($\frac{1}{2}$) being due on or before August 15th of the same year. For the year 1978 the tax shall be paid in two installments, one-half ($\frac{1}{2}$) being due on or before the 180th day after passage of the resolution adopting this tax and one-half ($\frac{1}{2}$) being due one or before the 300th day after passage of said resolution.

SECTION 11. APPEAL PROCEDURES FOR CONTESTED TAX LIABILITIES.

(a) Appeals of assessments are to be made in the first instance to the Commission according to the Rules and Regulations of the Commission.

(b) Appeals from a determination of the Commission are to be made to the Court of Appeals of the Navajo Nation, according to procedures established by the Com-

mission, but in no case may an appeal be made to the Court of Appeals of the Navajo Nation until payment of the amount determined by the Commission has first been made.

(c) The Commission shall be empowered to hold contested amounts in interest-bearing obligations of the United States, according to procedures which it shall establish.

SECTION 12. PENALTIES FOR FAILURE TO FILE.

(a) If a designated person required under Section 9 to file a declaration on behalf of a taxable person fails to file the declaration in a timely manner, a penalty of not more than one-half of one percent (.5%) of the value of the possessory interest may be assessed against such person by the Commission.

(b) An additional penalty of not more than two-tenths of one percent (.2%) of the value of the possessory interest may be assessed by the Commission for each month's delay in filing a declaration.

SECTION 13. PENALTIES FOR FAILURE TO PAY.

(a) A taxable person failing to pay an amount assessed at the time due will be subject to a penalty of five percent (5%) of the amount assessed.

(b) A taxable person failing to pay an amount assessed at the time due will be subject to an additional penalty on one-half percent ($\frac{1}{2}\%$) of the amount due for each full month of delay in making payment.

SECTION 14. EXTENSION OF TIME FOR FILING DECLARATION.

A person responsible for filing a declaration on behalf of a taxable person may request an extension of time for complying with the requirements of Section 9. The request should be made to the Commission in writing and must be made before the due date for the declaration. An extension of time will be granted only for good cause and at the discretion of the Commission.

SECTION 15. EXTENSION OF TIME FOR PAYING TAX.

The Commission may establish procedures for staying the due date for taxes assessed which are being appealed before the Commission.

SECTION 16. COLLECTION POWERS.

The Commission shall have full power to collect taxes and penalties assessed, including the power to attach and seize assets of a taxable person.

SECTION 17. PENALTY FOR FAILURE TO DESIGNATE PERSON TO FILE.

A taxable person required to file a declaration under Section 9 who fails to designate a person to file, as required, may have all rights to engage in productive activity within the Navajo Nation suspended by the Commission and shall be subject to permanent loss of all rights to engage in productive activity with the Navajo Nation.

SECTION 18. INTEREST.

Interest at an annual rate to be provided in the regulations of the Commission shall be collected on any unpaid amount of tax from the date the payment was due to the date payment is received, and shall be remitted to the taxpayer on any overpayment of tax from the date the payment was made to the date the overpayment is refunded.

SECTION 19. PENALTIES FOR ATTEMPT TO EVADE OR DEFEAT TAX.

(a) Any taxable person underpaying the tax imposed under this Act due to negligence or intentional disregard of the rules and regulations (but without the intent to defraud) shall be penalized One Hundred Dollars (\$100.00) for each offense plus ten percent (10%) of the under payment of tax.

(b) If any part of an underpayment of tax is shown to be due to fraud, a taxable person shall be penalized no less than twenty-five percent (25%) and no more than one hundred percent (100%) of the underpayment of tax.

(c) Any person who assists a taxable person in the fraudulent underpayment of taxes due under this Act shall be subject to a penalty of no less than \$100 for each underpayment plus twenty-five percent (25%) of the underpayment.

(d) Penalties shall be imposed in the first instance by the Commission subject to review by the Court of Appeals of the Navajo Nation.

SECTION 20. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

No suit for the purpose of restraining the assessment or collection of the tax imposed under this Act shall be maintained in any court by any person, whether or not such person is the person whom such tax was assessed.

SECTION 21. NONDISCRIMINATION.

No provision of this Act shall be construed as imposing a tax which discriminates on the basis of whether a Navajo Branch is owned or controlled by members of the Navajo Tribe.

SECTION 22. POWER TO NEGOTIATE TAX AGREEMENTS.

Thee Commission is authorized to negotiate mutual assessment and collection assistance agreements with any other tax jurisdiction. The agreements so negotiated will come into force only upon ratification by the Advisory Committee of the Navajo Tribal Council.

EXHIBIT B

Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE NAVAJO TRIBAL COUNCIL

*Enacting the Navajo Business Activity Tax
and Clarifying the Question of Compensation
of Commission Members*

WHEREAS:

1. The right to tax is part of the inherent sovereignty of any Nation; and
2. Navajo revenues from royalties and other traditional sources of income are shrinking, both in terms of nominal and constant dollars; and
3. Navajo population and Navajo needs are increasing, with the increase in the need for services partly a result of increased employment and development within the Navajo Nation; and
4. Like all other governments, it is appropriate for the Navajo Nation to call upon those doing business or engaged in economic activity within the Navajo Nation to share in the costs of providing governmental services to the residents of the Navajo Nation; and
5. By Navajo Tribal Council Resolution CJA-6-74 of January 16, 1974, the Navajo Tax Commission was created and it has made its initial reports to this Council and recommended the imposition of taxes on wealth and economic activity within the Navajo Nation; and
6. The Navajo Tax Commission has developed a proposed "Business Activity Tax" attached hereto as Exhibit "A" which it recommends be enacted into law by the Navajo Tribal Council; and
7. Questions have arisen concerning the appropriate compensation (or honoraria) to be paid Commission members, particularly members who are also employees of the Navajo Nation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The "Business Activity Tax" attached hereto as Exhibit "A" is hereby approved.
2. The Navajo Tax Commission is empowered to administer this tax.
3. The Courts of the Navajo Nation are vested with jurisdiction:
 - a) over any and all persons subject to this resolution.
 - b) to hear and determine any challenge to the validity of this resolution, either generally, or as applied to any person.
4. All resolutions or parts of resolutions (or attachments thereto) which are inconsistent with the provisions of this resolution are hereby repealed, including, without limitation, any resolution purporting to waive any right of taxation by the Navajo Nation.
5. This resolution shall take effect upon approval by the Navajo Tribal Council. The tax imposed by this Act shall be due and payable for calendar quarters beginning July 1, 1978.
6. If any provision of this resolution or the Navajo Business Activity Tax, or its application to any person or circumstance is held invalid by a final judgment of a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of the tax which can be given effect without the invalid provision or application, and to this end the provisions of this resolution and the Navajo Business Activity Tax are severable.
7. During the pendency of any litigation or arbitration concerning the validity of this resolution, the Con-

troller of the Navajo Nation is authorized and directed to place all payments made to the Navajo Nation pursuant to this resolution in interest-bearing obligations of the United States or interest-bearing accounts insured by an agency of the United States.

Following the termination of any such litigation or arbitration (and the conclusions of any appeals), and subject to any Order by any Court or Arbitrator rendering a decision or judgment therein, the Controller of the Navajo Nation shall remit to the prevailing party or parties any and all sums collected, together with the interest earned thereon.

The Controller of the Navajo Nation is directed to keep all such funds separate and apart from other funds under his supervisions and control.

8. Commission members shall be compensated under such terms and conditions as the Commission may by resolution determine, provided however, that compensation in excess of \$150.00 per day shall be subject to the prior approval of the Budget and Finance Committee of the Navajo Tribal Council and provided further that any Commissioner who is also an employee of the Navajo Nation shall take leave without pay from his or her position with the Navajo Nation during periods while he or she is engaged in Commission business for which he or she is to be compensated by the Commission.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed

by a vote of 41 in favor and 11 opposed, this 28th day of April, 1978.

/s/ Peter MacDonald
Chairman
Navajo Tribal Council

EXHIBIT "A"

BUSINESS ACTIVITY TAX

PART A: INTRODUCTION

SECTION 1. PREAMBLE.

The Business Activity Tax is designed to allow the Navajo people to share in the economic benefits generated within the Navajo Nation. The tax is assessed on the net dollar value contributed by a business enterprise to the output of economic goods and services in the Navajo Nation. The business enterprise is the vehicle through which individuals, in their roles as consumers or as suppliers of land, labor, or capital, derive the benefits of economic activity. As an intermediary in the economic process, the enterprise is a convenient and efficient instrument for collecting taxes on those enjoying the benefits of the economic activity taking place within the Navajo Nation.

SECTION 2. NAME.

The tax imposed by this Act shall be called the Business Activity Tax.

PART B: OPERATIVE RULES

SECTION 3. DEFINITIONS.

Subject to additional definitions (if any) contained in the subsequent sections of this Act and unless the context otherwise requires, in this Act;

(a) *Navajo Branch.* A "Navajo Branch" means any corporation, unincorporated association, partnership, trust, estate, joint venture, or any part of the foregoing, or any individual or group of individuals of any government (other than the government of the Navajo Nation) which engages in trade, commerce, manufacture, power production, or any other productive activity (whether for profit or not) wholly or in part within the Navajo Nation. It does not include, however, any subdivision or enterprise of the government of the Navajo Tribe.

(b) *Navajo Source Gains.* "Navajo Source Gains" of a Navajo Branch are the gross receipts of that branch from the sale either within or without the Navajo Nation of Navajo goods or services, as those terms are defined in Paragraphs (c) and (d), minus deductions allowable under Section 5 of this title:

(i) *Computation of Value of Sales Without the Navajo Nation.* Navajo Source Gains for sales without the Navajo Nation are determined by the value of Navajo goods and services at the time and place said goods and services are transported outside the Navajo Nation.

(c) *Navajo Goods.* "Navajo Goods" are all personal property produced, processed, or extracted within the Navajo Nation, including coal, oil, uranium, gas, and other natural resources and electrical power.

(d) *Navajo Services.* "Navajo Services" are all services performed within the Navajo Nation, including the transport or transmission by whatever means of coal, oil, uranium, gas, other natural resources and electrical power.

(e) *Sale.*

(i) *General Rule.* A "Sale" consists of a transfer of title between buyer and seller for a price.

(ii) *Intra-Branch Rule.* A "Sale" also consists of the delivery of Navajo goods or the performance of services by a Navajo Branch for the use or benefit of any entity, organization, or other person of which the branch is a part.

(f) *Person; Control; Related Persons.*

(i) *Person.* "Person" means an organization of any kind, whether it be a sole proprietorship, partnership, trust, estate, an association, a corporation or government, whether organized for profit or not and includes as well any branch, division or agency of such. In addition, "Person" includes individuals or group of individuals.

(ii) *Control.* "Control" includes the right or any kind of ability to direct the performance or activity of another person, direct or indirect, whether legally enforceable or not and however such right may be exercisable or exercised.

(iii) *Related Persons.* "Related Persons" are two or more persons owned or controlled by the same interest. "Related Persons", as applied to individuals, also means two or more individuals who have a legal relationship arising out of marriage or adoption or blood, through the third degree of kinship.

(g) *Gross Receipts.* "Gross Receipts" of the Navajo Branch mean and are to be computed according to the following rules:

(i) *General Rule.* Except as provided in Subparagraphs (ii) and (iii) below, the "Gross Receipts" of the Navajo Branch are the amount of money plus the fair market value of property received by the Branch on sale of Navajo goods and services.

(ii) *Sales Among Related Persons.* On the sale of Navajo goods and services by a Navajo Branch to a related person, "Gross Receipts" are the fair market value of the Navajo goods or services sold.

(iii) *Estimate of Fair Market Value.* When practical, fair market value of Navajo goods and services sold to a related person is to be computed on the basis of prices paid in comparable transactions, but if such information is not available, the estimate of fair market value will be made according to Regulations adopted by the Commission.

(h) *Commission.* "Commission" means the Navajo Tax Commission.

(i) *Fraud.* "Fraud" has the same meaning as that established in the interpretation of Section 7206 of Title 26 of the United States Code.

SECTION 4. IMPOSITION OF TAX.

A tax is hereby imposed on the Navajo source gains of a Navajo Branch at a rate established by Section 6 and the regulations thereunder. The amount of tax due for any period is computed by multiplying the Navajo source gains of a Navajo Branch for the period by the tax rate.

SECTION 5. DEDUCTIONS.

In computing the tax payable under this Act, a taxable person may deduct from his Navajo gross receipts

the Standard Deduction set forth in Subsection (a) and the expenses set forth in Subsection (b).

(a) *Standard Deduction.* A Standard Deduction of ten (10%) percent of the taxable person's Navajo Gross receipts during the period for which taxes are being assessed and collected or \$125,000.00, whichever is greater, is allowed.

(b) *Deductible Expenses.* A taxable person may deduct from his Navajo gross receipts the following expenses paid or accrued during the period for which taxes are being assessed and collected from his activities giving rise to Navajo gross receipts:

(i) Salaries or other compensation paid to members of the Navajo Tribe.

(ii) Purchases of Navajo goods and services.

(iii) Any payment made to the government of the Navajo Nation, except for taxes paid pursuant to this Act and any penalties or fines.

SECTION 6. RATES OF TAX.

Tax is assessed on Navajo source gains at the rate established in Regulations by the Navajo Tax Commission. The rate will be no less than four (4%) percent or greater than eight (8%) percent. Until some other rate is established, the rate is five (5%) percent. A change in the tax rate must be announced at least one full period before its scheduled effective date.

SECTION 7. PERIOD OF TAX.

The tax under this Act is assessed and collected each quarter of the calendar year.

SECTION 8. CONSOLIDATION OF BRANCHES.

If any entity has more than one branch within the Navajo Nation or there exists more than one branch within the Navajo Nation controlled by related persons, then either all said branches shall be entitled to one \$125,000.00 standard deduction collectively, or each branch must take the ten (10%) deduction provided in Section 5 (a).

SECTION 9. NONDISCRIMINATION.

No provision of this Act shall be construed as imposing a tax which discriminates on the basis of whether a Navajo Branch is owned or controlled by members of the Navajo Tribe.

SECTION 10. EXEMPTIONS.

(a) Nothing within this Act shall be construed as imposing a tax on the government of the Navajo Tribe or on any wholly owned subdivision or enterprise of the government of the Navajo Tribe.

(b) Nothing within this Act shall be construed as imposing a tax on commercial establishments that are primarily engaged in selling non-Navajo goods at retail within the Navajo Nation.

(c) Nothing within this Act shall be construed as imposing a tax on traditional farming or livestock activities within the Navajo Nation.

PART C: ADMINISTRATION

SECTION 11. FILING OF TAX DECLARATION.

A declaration of tax due must be filed with the Commission within one month after the end of each calendar

quarter. Declaration are due on May 15, August 15, November 15, and February 15 of each calendar year.

SECTION 12. PAYMENT OF TAX.

Payment is due at the time of the filing of a declaration. The Commission, however, may require payment of tax on a monthly basis in appropriate cases.

SECTION 13. PERSONS REQUIRED TO FILE AND MAKE PAYMENT.

(a) Except as provided in Paragraph (c), each Navajo Branch must designate a natural person as the individual responsible for filing a declaration and making payment of the tax due. The individual designated must be empowered to act on behalf of the Branch on all matters relating to the tax imposed under this Act.

(b) Except as provided in Paragraph (c), each individual designated to file and make payment due in accordance with Paragraph (a) above must file a declaration on behalf of the Navajo Branch and make payment due on behalf of the Navajo Branch.

(c) Exceptions:

(i) The obligation to designate a natural person set forth in Paragraph (a) does not apply until a Navajo Branch has Navajo gross receipts of \$125,000.00 or more in any quarter after the effective date of this Act.

(ii) No declaration need be filed by any Navajo Branch for any quarter in which Navajo gross receipts are less than \$125,000.00. This exception does not apply if the Navajo Branch, or any related person to the Branch had annual Navajo gross receipts exceeding \$500,000.00 in

any of the three (3) years preceding the calendar quarter in question.

SECTION 14. EXTENSION OF TIME FOR FILING DECLARATION.

The individual responsible for filing a declaration on behalf of a Navajo Branch may request an extension of time for complying with the requirements of Section 11. The request should be made to the Commission in writing and must be made before the due date for the declaration. An extension of time will be granted only for good cause and at the discretion of the Commission.

SECTION 15. EXTENSION OF TIME FOR PAYING TAX.

The Commission may establish procedures for staying the payment of taxes assessed which are being appealed before the Commission. In no case may payment be stayed more than ten (10) days after a decision on an appeal has been rendered by the Commission.

SECTION 16. COLLECTION POWERS.

The Commission shall have full power to collect taxes and penalties assessed, including the power to attach and seize assets of a Branch and any other powers available to the Navajo Nation for collection of debts owed it.

SECTION 17. ASSESSMENT POWERS.

The Commission shall have the power to reassess a taxpayer when it appears that the declaration filed by the taxpayer does not reflect the amount of tax due under this Act. If no declaration is timely filed, the Commission is

authorized to make an estimate of the tax due, and this estimate is binding on the taxpayer unless it is shown that the estimate was grossly erroneous.

SECTION 18. RECORD KEEPING REQUIREMENTS.

(1) Every taxable person shall keep full and true records of the gross receipts for each period received from sale of Navajo goods and services and of all deductible expenses, in accordance with the Regulations established by the Commission.

(2) In the case of a Navajo Branch which is part of a corporation, partnership, association or other legal entity, separate accounting books for the Branch must be maintained.

(3) Records required to be kept under this section must be preserved for six years beyond the time payment of tax is made, or if no payment is due, for six years beyond the end of the payment to which the records relate.

SECTION 19. APPEALS PROCEDURES FOR CONTESTED TAX LIABILITIES.

(a) Appeals of assessments under this Act are to be made in the first instance to the Commission according to the procedures of the Commission.

(b) Appeals from a determination of the Commission are to be made to the Court of Appeals of the Navajo Nation, according to procedures established by the Commission, but in no case may an appeal be made to the Court of Appeals by the Navajo Nation until payment of the tax assessed by the Commission has first been made.

(c) The Commission shall be empowered to hold contested amounts in interest-bearing trust accounts, according to procedures which it shall establish.

SECTION 20. STATUTE OF LIMITATIONS.

(a) Any tax imposed by this Act shall be assessed within six years after the declaration was filed; except as provided in Paragraphs (b) and (d).

(b) In the case of a false fraudulent declaration with the intent to evade tax, the tax may be assessed within six years of the first discovery of the fraud.

(c) Any action in a court or by levy for collection of tax imposed under this Act must be commenced within six years of the assessment of the tax, except as provided in Paragraphs (d) and (e).

(d) The running of the period of limitations provided in Paragraphs (a) and (c) is suspended during any period the Commission is prohibited by any court from making an assessment or commencing collection proceedings and during any period of appeal of an assessment made by the Commission.

(e) The running of the period of limitations of collection may be suspended for any period agreed upon between the taxpayer and the Commission.

SECTION 21. INTEREST.

Interest at an annual rate to be provided in the regulations of the Commission shall be collected on any unpaid amount of tax from the date the payment was due to the date payment is received, and shall be remitted to the taxpayer on any overpayment of tax from the date the payment was made to the date the overpayment is refunded.

SECTION 22. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

No suits for the purpose of restraining the assessment or collection of the tax imposed under this Act shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

SECTION 23. POWER TO NEGOTIATE TAX AGREEMENTS.

The Commission is authorized to negotiate mutual assessment and collection assistance agreements with any other tax jurisdiction. The agreements so negotiated will come into force only upon ratification by the Advisory Committee, Navajo Tribal Council.

PART D. PENALTIES

SECTION 24. PENALTIES FOR FAILURE TO FILE.

(a) If a person required under Section 13 of this Act to file a declaration fails to file in a timely manner, a penalty of two (2%) percent of the gross receipts of the Navajo Branch for the period will be assessed against the Branch by the Commission.

(b) An additional penalty of one-fourth ($\frac{1}{4}\%$) percent of the gross receipts of the period, not to exceed six (6%) percent of those gross receipts, will be assessed by the Commission for each month's delay in filing a declaration.

(c) The penalty for failure to file will be assessed even if it is ultimately determined that no tax is due for the period.

(d) A person who files within the extended period permitted under Section 14 is considered to have filed in a timely manner.

SECTION 25. PENALTIES FOR FAILURE TO PAY.

(a) If a Navajo Branch fails to pay an amount assessed at the time due, a penalty of five (5%) percent of the amount assessed will be imposed by the Commission.

(b) If a Navajo Branch fails to pay an amount assessed at the time due, an additional penalty of one-half ($\frac{1}{2}\%$) percent for each full month of delay in making payment will be imposed by the Commission.

SECTION 26. PENALTY FOR FAILURE TO DESIGNATE PERSON TO FILE AND MAKE PAYMENT.

A Navajo Branch which fails to designate a person to file and make payment as required under Section 13 may have all rights to engage in productive activity within the Navajo Nation suspended by the Commission and shall be subject to permanent loss of all rights to engage in productive activity with the Navajo Nation. The Commission is authorized to impose the penalties under this section, subject to review by the Court of Appeals of the Navajo Nation.

SECTION 27. PENALTY FOR FAILURE TO PROVIDE INFORMATION REQUESTED.

A person required to provide information necessary or helpful for the assessment or collection of tax who fails to do so may be fined up to \$5,000.00 for each offense and may have all rights to engage in productive activity within the Navajo Nation suspended. Such persons must first be notified in writing of the request for information and must be given adequate opportunity to comply before any penalty is imposed. The Commission is authorized to impose the penalties under this section, subject to review by the Court of Appeals of the Navajo Nation.

SECTION 28. PENALTIES FOR ATTEMPT TO EVADE OR DEFEAT TAX.

(a) Any Navajo Branch underpaying the tax imposed under this Act due to negligence or intentional disregard of the rules and regulations (but without the intent to defraud) shall be penalized \$100.00 for each offense plus ten (10%) percent of the underpayment of tax.

(b) If any part of an underpayment of tax is shown to be due to fraud, a Navajo Branch shall be penalized no less than twenty-five (25%) percent and no more than two-hundred (200%) percent of the underpayment. The penalty shall be imposed in the first instance by the Commission subject to review by the Court of Appeals of the Navajo Nation.

(c) Any person who assists a Navajo Branch in the fraudulent underpayment of taxes due under this Act shall be subject to a penalty of no less than \$100.00 for each underpayment plus twenty-five (25%) percent of the amount of the underpayment.

VCLASSIS & OTT
1545 WEST THOMAS ROAD
PHOENIX, ARIZONA 85015
(602) 248-8811

Attorneys for Navajo Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. Civ. 80-247-PHX-WPC

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff,

v.

NAVAJO TRIBE OF INDIANS, et al.,
Defendants.

DEFENDANTS' STATEMENT OF FACTS UNDER LOCAL RULE 11(i) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF KERR-McGEE

1. Kerr-McGee Corporation is a non-Indian corporation which presently conducts oil and gas operations within the Navajo Reservation in Arizona. (Complaint, ¶ 1; Stipulation dated December 7, 1979.)

2. The possessory interest tax enacted by Navajo Tribal Council Resolution CJA-13-78 and the business activity tax enacted by Navajo Tribal Council Resolution CAP-36-78 by their terms are applicable to the Kerr-McGee Corporation oil and gas operations on the Navajo Reservation in Arizona. (Complaint, ¶ 1, 17.)

3. By memorandum dated June 6, 1959, a copy of which is attached hereto as Exhibit "A", the Solicitor's

Office of the Department of the Interior determined that Navajo resolutions governing tribal labor policy did not require Secretarial approval.

4. By letter dated June 9, 1978 and by memoranda of May 15, 1978 and May 4, 1978, copies of which are attached hereto as Exhibits "B", "C" and "D", the Department of the Interior determined that the Navajo Possessory Interest Tax did not require Secretarial approval and so informed the tribe.

DATED: 4-5-82

Respectfully submitted,
VLASSIS & OTT
1545 West Thomas Road
Phoenix, Arizona 85015

By /s/ Katherine Ott
George P. Vlassis
Katherine Ott
Gary Verburg

EXHIBIT "A"

9-1 9

Surname:
FILE COPY
Sol. Indians

[Seal]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D.C.

Memorandum

Jun 6, 1959

To: Commissioner of Indian Affairs
From: Assistant Solicitor, Indian Legal Activities
Subject: Approval of Tribal Ordinances

With respect to the Navajo tribal resolutions recently enacted involving tribal labor policy, I am aware of nothing in the law or regulations concerning Indian Affairs which requires you to approve or disapprove such resolutions.

It has been emphasized that "Indians are not wards of the Executive officers, but wards of the United States." (*Ex Parte Bi-A-Lil-Le*, 100 Pac 450 (1909); see Fed. Indian Law, 1958, p. 563)). Congress has not required the Secretary to approve tribal ordinances, nor has the President or the Secretary, under authority delegated by Section 2 of 25 U.S.C., seen fit to issue regulations referring to Secretarial consideration or approval of tribal ordinances. Many tribal constitutions adopted pursuant to Section 16 of the Indian Reorganization Act (25 U.S.C. 476, 48 Stat. 987), contain provisions implying Secretarial consideration of tribal ordinances, at least, in special cases. These provisions were inserted by the Tribe with the consent of the Secretary. This is within his authority, but it is not a Congressional mandate. The Navajos have no such written constitution.

The Secretary has a responsibility to encourage and assist Indian tribes under federal guardianship to carry out their tribal governmental functions and to conduct their tribal business in a legal and efficient manner. This task is obviously limited, however, by personnel and funds, as well as by the Congressional policy to encourage the Indians to assume continuously increasing responsibility and to develop self-reliance.

In addition, certain resolutions may concern tribal action which by statute require Secretarial approval, such

as encumbrances of tribal property. Here the Secretary must act because the statute requires approval of the specific act. The resolutions attached are not of this nature.

/s/ Franklin C. Salisbury
Assistant Solicitor
Indian Legal Activities

cc: Secretary's Files
Solicitor's Files
Asst. Sol., ILA
Assoc. Sol., IA
JBrabner-Smith

JBrabner-Smith:amj:6/8/59

Attachments

EXHIBIT "B"

UNITED STATES DEPARTMENT OF
THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
Window Rock, Navajo Nation, AZ 86515

[SEAL]

In Reply Refer to
101—Area Tribal
Operations

June 9, 1978

Mr. Peter MacDonald
Chairman, Navajo Tribal Council

Dear Mr. MacDonald:

Enclosed please find a copy of Navajo Tribal Council Resolution CJA-13-78, entitled "*Enacting the Navajo Possessory Interest Tax*".

This resolution was classified Class "A", requiring Washington approval. However, a copy of memorandum dated May 4, 1978 from Associate Solicitor to Director, Office of Trust Responsibilities is enclosed, explaining why this resolution does not require Washington approval. Also enclosed is a memorandum dated May 15, 1978 from Assistant Secretary — Indian Affairs to the Area Director, Navajo Area.

These memoranda are self-explanatory and in accordance, classification of Resolution CJA-13-78 has been changed to Class "C", requiring no BIA action.

Sincerely yours,

/s/
Area Director

Enclosures

EXHIBIT "C"

UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20240

[SEAL]

May 15, 1978

Memorandum

To: Area Director, Navajo Area Office
From: Assistant Secretary — Indian Affairs
Subject: Navajo Possessory Interest Tax (Tribal Resolution CJA-13-78)

Attached, for your information, is a copy of a memorandum prepared by the Office of the Solicitor as to whether or not the subject ordinance requires approval by the Secretary. You are accordingly advised that the ordinance does not require Secretarial approval.

/s/ Forrest J. Gerard

Attachment

RECEIVED
ADMINISTRATION
[Illegible] 1978
NAVAJO
AREA OFFICE

Inc—101
Cy—Ea. Azy Supt
100
102

EXHIBIT "D"

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

MAY 4, 1978

To: Director, Office of Trust Responsibilities
From: Associate Solicitor, Division of Indian Affairs
Subject: Navajo Possessory Interest Tax

This responds to your memorandum of April 26, 1978, requesting a written opinion from this office on whether Secretarial approval is required for Navajo Tribal Council

cil Resolution CJA-13-78, which enacts a possessory interest tax.

The memorandum of February 15, 1978, from the Acting Navajo Area Director to the Assistant Secretary submitting the resolution for review suggests the resolution may require approval because it repeals portions of earlier tribal resolutions that were subject to Secretarial approval. Those earlier resolutions required Secretarial approval because they leased restricted land or granted easements on such lands and Secretarial approval of such tribal actions is required under 25 U.S.C. §§ 323 and 415. Neither of those sections, however, authorize Secretarial approval or disapproval of a tribal ordinance merely because it affects in some manner a prior resolution that was subject to Secretarial approval.

Resolution CJA-13-78 does not purport to lease restricted land or to grant easements over such land. Neither does it purport to take any other action which, under federal statute or regulation or under tribal law, is subject to Secretarial approval or disapproval.

Accordingly, we conclude that Navajo Tribal Council Resolution CJA-13-78 does not require Secretarial approval.

/s/ Thomas W. Fredericks

VLASSIS & OTT
1545 WEST THOMAS ROAD
PHOENIX, ARIZONA 85015
(602) 248-8811

Attorneys for Navajo Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-247-PHX-WPC
 KERR-McGEE CORPORATION,
 a Delaware corporation,
 Plaintiff,

v.

NAVAJO TRIBE OF INDIANS, et al.,
 Defendants.

ANSWER TO FIRST AMENDED COMPLAINT

(Filed May 7, 1982)

Defendants Navajo Tribe, Navajo Tax Commission, Peter MacDonald, Robert Shorty, Jr., Glenn George, William Morgan, Jr. and Lawrence White answer Kerr-McGee's First Amended Complaint as follows:

1. Admit the allegations contained in paragraphs 3, 4, 5, 6, 7, 19, 30, 41, 42, 48, 103 and 108.

2. Deny each and every allegation contained in paragraphs 11, 12, 13, 14, 15, 16, 17, 31, 36, 37, 38, 39, 44, 45, 46, 47, 50, 51, 52, 56, 57, 58, 60, 61, 62, 70, 71, 73, 75, 77, 78, 79, 81, 83, 84, 86, 89, 90, 93, 94, 96, 98, 99, 100, 102, 104, 105, 106, 109, 111, 112 and 116.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 10, 21, 22, 23, 24, 25, 26, 27, 64, 65, 66, 67, 68, 69, 76, 87, 88 and 95, and, therefore, deny the same.

4. With respect to the allegations contained in paragraph 1 of Plaintiff's First Amended Complaint, defendants admit that the Navajo Tribal Council enacted a Business Activity Tax and a Possessory Interest Tax which apply to business activity conducted on lands under Nava-

jo Tribal jurisdiction and to leasehold interests entered into with the Navajo Tribe; admit that both the tax laws confirm jurisdiction in the Navajo Tribal Courts to adjudicate all controversies concerning the taxes. Defendants deny that they are interfering with Kerr McGee's oil and gas operations and deny that they are breaching Kerr McGee's oil and gas mineral leases. With respect to the remaining allegations in paragraph 1 of the First Amended Complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations and therefore deny such allegations.

5. With respect to the allegations contained in paragraph 8 of the First Amended Complaint, defendants admit that they are acting pursuant to Navajo Tribal authority and deny the remaining allegations.

6. With respect to paragraph 9, deny that the complained of actions of James G. Watt exceeds his lawful authority and admit the remaining allegations.

7. With respect to the allegations contained in paragraph 18, allege that lands in addition to treaty and executive order lands are part of the Navajo Reservation in the State of New Mexico and admit all remaining allegations.

8. With respect to the allegations contained in paragraph 20, admit the allegations contained therein, and further allege that the Secretary of Interior has determined that his approval of Navajo tax laws is an unnecessary pre-condition to the taxes validity.

9. With respect to the allegations in paragraph 28, 40, 53, 63, 74, 80, 85, 91, 101 and 107, defendants incorpo-

rate by reference each and every answer set forth herein to the allegations incorporated by reference in paragraphs 28, 40, 53, 63, 74, 80, 85, 91, 101 and 107 of the First Amended Complaint.

10. With respect to the allegations contained in paragraph 29, Defendants admit that the Tribe exercises powers of self-government over its members and over its territory.

11. With respect to the allegations contained in paragraph 32, Defendants admit that it has no criminal jurisdiction over non-Indians and denies the remaining allegations contained therein.

12. With respect to the allegations contained in paragraph 33, defendants admit that plaintiff is neither an Indian nor member of the Navajo Tribe and alleges that Kerr-McGee is a fictitious person, a corporation, which possesses no ethnicity or racial characteristics.

13. With respect to the allegations contained in paragraph 34, defendants admit that the taxes purport to empower the Tribe to suspend permanently Plaintiff's right to engage in oil and gas mineral operations on and under the Reservation in the event of non-compliance with the taxes in accord with the Treaty of 1868 between the Navajo Tribe and the United States of America. Defendants deny the remaining allegations contained in paragraph 34.

14. With respect to the allegations contained in paragraphs 35 and 49, defendants admit that Kerr-McGee is not a trespasser, but denies that Plaintiff has any right to remain on the Reservation if Plaintiff disregards valid and enforceable Tribal laws.

15. With respect to the allegations contained in paragraph 43, defendants admit that the Treaty of June 1, 1868, states that the Navajo Tribe "will not in future oppose the construction of railroads, wagon-roads, mail stations or other works of utility or necessity which may be ordered or permitted by the laws of the United States . . ." provided that the "Government will pay the Tribe whatever amount of damage may be assessed . . ."

16. With respect to the allegations contained in paragraph 54, defendants admit that the United States possesses plenary power over the Navajo Tribe, but denies that such power can be exercised in an unconstitutional manner.

17. With respect to the allegations in paragraph 55, defendants admit that plaintiffs are subject to rules and regulations promulgated by the Secretary, but denies the remaining allegations contained therein.

18. With respect to the allegations contained in paragraph 59, Defendants are without knowledge or information to form a belief as to the truth of the location of Plaintiff's mineral leases and, therefore, denies the same. Defendants deny the remaining allegations in paragraph 59.

19. With respect to the allegations contained in paragraph 72, defendants admit that the taxes provide for suspension of plaintiff's right to engage in oil and gas and mineral operations on and under the Reservation for non-compliance with the taxes; denies that such conduct constitutes a violation of plaintiff's right to enjoy the demised premises; and is without sufficient knowledge and information to form a belief as to the truth of a covenant

between the Tribe and plaintiff entitling plaintiff to the quiet and peaceable enjoyment of the demised premises and therefore denies the same.

20. With respect to the allegations contained in paragraph 82, defendants admit that the taxes exempt from taxation Tribally owned enterprises, activities and possessory interests of the Tribe. Defendants deny that the taxes provide a direct commercial advantage to local business. With respect to the remaining allegations in paragraph 82, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, deny the same.

21. With respect to the allegations in paragraph 92, defendants admit that the Indian Civil Rights Act provides as follows:

"No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

22. With respect to the allegations in paragraph 97, defendants admit that the taxes exempt Tribally owned enterprises, activities, and possessory interests of the Tribe and admits that the possessory interest tax exempts from taxation possessory interests valued at less than \$100,000, and admits that traditional activities are exempt under the Business Activity Tax. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 97 and, therefore, deny the same.

23. With respect to the allegations contained in paragraph 110, defendants admit the allegations contained

therein, and further allege that the Secretary has determined that his approval of the taxes is not necessary.

24. With respect to the allegations contained in paragraph 113, defendants deny that the Business Activity Tax purports to have become effective as of July 1, 1978 and admits the remaining allegations contained therein.

25. With respect to the allegations in paragraph 114, defendants admit the allegations contained therein in the event that plaintiff does not comply with taxes.

26. With respect to the allegations in paragraph 115, defendants admit that the Business Activity Tax is due 45 days after formal adoption of Navajo Tax Commission rules and regulations and deny the remaining allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendant Navajo Tribe of Indians and the Navajo Tax Commission, as an agency of the Navajo Tribe, enjoy sovereign immunity from suit which has not been waived by the Tribe. Individual Navajo defendants, as officers of the Tribe, enjoy immunity from suit for all activities conducted pursuant to lawful Tribal authority and the Navajo tax laws are a lawful exercise of such Tribal authority.

THIRD AFFIRMATIVE DEFENSE

In the event that the Tribal taxes violate plaintiff's leases, Count IV of plaintiff's First Amended Complaint is barred on the grounds that the Navajo land leases possessed by plaintiff are unconscionable and void, unenforceable and of no effect.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff, by failing to join the Secretary of Interior, has failed to join an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

WHEREFORE, Navajo defendants request judgment dismissing the Complaint and that costs and expenses incurred in the litigation of this action by Navajo defendants be awarded to Navajo defendants.

RESPECTFULLY SUBMITTED this 7th day of May, 1982.

Vlassis & Ott

By /s/ Katherine Ott
George P. Vlassis, Esq.
Katherine Ott, Esq.
1545 West Thomas Road
Phoenix, Arizona 85015

COPY of the foregoing mailed/hand-delivered this 7th day of May, 1982, to:

The Honorable William P. Copple
United States District Court
District of Arizona
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Phoenix, AZ 85025

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/s/ Katherine Ott

MEMORANDUM OPINION AND ORDER,

United States District Court for the
 District of Arizona, *Kerr-McGee
 Corporation v. Navajo Tribe of Indians,
 et al.*, NO. CIV 80-247 PHX WPC

(filed June 29, 1982)

This document is printed as Appendix B of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT COURT OF ARIZONA

No. CIV-80-247 PHX-WPC

KERR-McGEE CORPORATION,
 Plaintiff,

v.

NAVAJO TRIBE OF INDIANS, et al.,

Defendants.

JUDGMENT AND PERMANENT INJUNCTION
 (Filed September 22, 1982)

In accordance with this Court's Memorandum and Order of June 29, 1982, and for the reasons stated therein,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Except for the Navajo Tribe of Indians and the Navajo Tax Commission as to which plaintiff's amended complaint is dismissed on the basis of sovereign immunity, this Court has jurisdiction over the parties and the claims asserted by plaintiff Kerr-McGee Corporation pursuant to 28 U.S.C. § 1331.

2. The defendants' motion for summary judgment with respect to Counts I, II, III, IV, V, VI, VII and VIII of the amended complaint is granted and those Counts are accordingly dismissed.

3. On motion by plaintiff, Count X is dismissed without prejudice pursuant to Rule 41(a), *Fed. R. Civ. P.*

4. Plaintiff's motion for summary judgment with respect to Count IX of the amended complaint is granted.

5. The Business Activity Tax and the Possessory Interest Tax which the Navajo Tribe enacted in 1978 as Navajo Tribal Council Resolution CAP-36-78 and Resolution CJA-13-78, respectively, are null, void, illegal, invalid and unenforceable against plaintiff Kerr-McGee Corporation's operations on Navajo treaty lands in Arizona and the said taxes shall have no force or effect on such operations unless and until they receive the lawful ap-

proval of the Secretary of the Interior of the United States.

6. Defendants Peter MacDonald, Chairman of the Navajo Tribe of Indians; Robert Shorty, Jr., Glenn George, William Morgan, Jr., members of the Navajo Tax Commission; and Lawrence White, Director of the Navajo Tax Commission, as well as their successors and all persons in active concert or participation with them who receive actual notice of this order are permanently enjoined as follows:

(a) From applying, enforcing or attempting to enforce the said Business Activity Tax and the said Possessory Interest Tax against plaintiff Kerr-McGee Corporation's operations on Navajo treaty lands in Arizona.

(b) From levying, assessing, collecting, attempting to assess or attempting to collect against or from plaintiff Kerr-McGee Corporation any taxes on Kerr-McGee Corporation's operations on Navajo treaty lands in Arizona pursuant to the said Business Activity Tax and the said Possessory Interest Tax; and

(c) From initiating, seeking or issuing any order to show cause, restraining order, injunction or other order or judgment against plaintiff Kerr-McGee Corporation based upon or arising out of the said Business Activity Tax and the said Possessory Interest Tax as said taxes relate to Kerr-McGee Corporation's operations on Navajo Treaty lands.

7. Each party shall bear its own costs.

DATED: September 22, 1982.

/s/ William P. Copple
United States District Court Judge

OPINION, United States Court
of Appeals for the Ninth Circuit,
*Kerr-McGee Corporation v. Navajo Tribe
of Indians, et al.*, (filed April 17, 1984)
(731 F.2d 597)

This document is printed as Appendix A of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5725

USDC No. CV 80-247 PHX WPC

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff-Appellee,

vs.

NAVAJO TRIBE OF INDIANS,
Defendant-Appellant.

No. 82-5736

USDC No. CIV 80-247

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff-Appellant,

vs.

NAVAJO TRIBE OF INDIANS, a tribe of American
Indians recognized by the United States Department
of the Interior, et al.,

Defendants-Appellees.

ORDER

(Filed Apr. 17, 1984)

Before MERRILL, SKOPIL and FERGUSON, Circuit
Judges

MERRILL, Circuit Judge.

In its appeal in this action Kerr-McGee argued that the Navajo Tribe ought to be estopped from relitigating the issue of the necessity of approval by the Secretary of the Interior of certain taxes levied by the Navajo Tribe on mineral leases issued by the Tribe. Kerr-McGee had successfully urged the District Court to follow the holding of the Federal District Court for the District of Utah in *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D. Utah, March 8, 1979), so as to collaterally estop the Tribe from litigating the Secretary approval issue in the instant action.

In our Opinion, *Kerr-McGee v. Navajo Tribe of Indians*, Nos. 82-5725, 82-5736, April —, 1984), we noted that the Tenth Circuit had, in the interim, reversed the Utah District Court in its holding that approval of the Tribe's tax by the Secretary of the Interior was required. *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). Accordingly, while we agreed with the reasoning of the Tenth Circuit in its conclusion that Secretarial approval was not required, we found it, of course, unnecessary to determine whether the Tribe was collater-

ally estopped from litigating the issue in light of the reversal of the lower court's opinion.

It is possible that the Tenth Circuit may yet consider the issue of Secretarial approval *en banc* and conclude—as did the Utah District Court—that approval by the Secretary of the Interior is the *sine qua non* of Indian taxation. In the event of such a determination by the Tenth Circuit, either *en banc* or upon rehearing, Kerr-McGee may again find it appropriate to raise the estoppel argument with respect to the issue of Secretarial approval. Nothing in our Opinion ought to be construed as precluding such action by Kerr-McGee in the event of a determination by the Tenth Circuit of the need for approval of the Navajo tax by the Secretary of Interior.

IT IS SO ORDERED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5725

CV-80-247-PHX-WPC

KERR-McGEE Corp., a Delaware corp.,

Plaintiff/Appellee,

vs.

NAVAJO TRIBE OF INDIANS,

Defendants/Appellant.

No. 82-5736

CV-80-247-PHX-WPC

KERR-McGEE, Corp., a Delaware corp.,

Plaitniff/Appellant,

vs.

NAVAJO TRIBE OF INDIANS, et al.,
Defendants/Appellees.

APPEAL from the United States District Court for the District of Arizona (Phoenix).

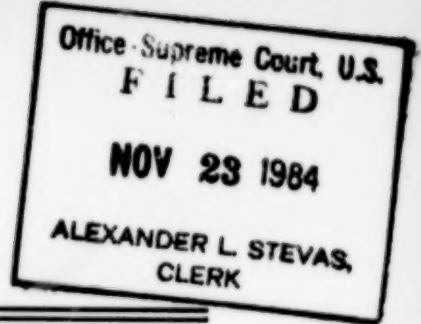
THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed on appeal taken by Kerr-McGee. On the appeal taken by the Navajo Tribe, judgment Reversed.

Court Reporter
Public Defender
US Attorney
US Magistrate
Marshal
Probation
Counsel_____

\$70 Fee Paid
Filed and entered April 17, 1984

(13)
No. 84-68



In The
Supreme Court of the United States
October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

- I. CAN INDIAN TRIBES WHICH HAVE REFUSED TO BECOME ORGANIZED UNDER THE INDIAN REORGANIZATION ACT OF 1934 AND WHICH HAVE REFUSED TO ADOPT TRIBAL CONSTITUTIONS UNILATERALLY IMPOSE TAXES ON NON-INDIANS WITHOUT APPROVAL FROM THE SECRETARY OF THE INTERIOR?
- II. CAN UNORGANIZED INDIAN TRIBES ASSERT AUTHORITY OVER NON-INDIAN OIL AND GAS LESSEES WHEN THE CONTROLLING ACT OF CONGRESS PERMITS THE EXTENSIVE FEDERAL REGULATION TO BE SUPERSEDED ONLY BY ORGANIZED INDIAN TRIBES, IN ACCORDANCE WITH THE PROVISIONS OF THEIR TRIBAL CONSTITUTIONS?

*The list of corporate subsidiaries and affiliates of petitioner, required by Rule 28.1, Rules of the Supreme Court of the United States, was set forth in the petition for writ of certiorari at page i.

PARTIES BEFORE THE COURT OF APPEALS

The parties before the Court of Appeals for the Ninth Circuit were Tribal Chairman Peterson Zah and the director and members of the Navajo Tax Commission: Delfred Wauneka, Robert Shorty, Jr., Glenn George and William Morgan, Jr.

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No. 84-68

In The
Supreme Court of the United States
October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion and order of the Ninth Circuit Court of Appeals in *Kerr-McGee Corporation v. Navajo Tribe of Indians* are reported at 731 F.2d 597 (Pet. App. A at 1-12) and 731 F.2d 604 (Jt. App. at 84). The opinion of the district court was not reported. (Pet. App. B at 1-23).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1984 (Jt. App. at 85). The petition for a writ of certiorari was filed on July 12, 1984, and was granted on October 9, 1984. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. United States Code, Title 25:

Section 636. Adoption of Constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall be-

come effective when approved by the Secretary. The constitution may be amended from time to time in the manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

2. United States Code, Title 25:

Section 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject

to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

3. United States Code, Title 25:

Section 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Section 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall re-

serve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the rights of tribes organized and incorporated under Sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471, 473, 474, 475, 476 to 478, and 479 or this title.

Section 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

4. Code of Federal Regulations, Title 25:

Section 211.29. Exemption of leases made by organized tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

STATEMENT OF THE CASE

Petitioner extracts oil and gas from certain lands of the Navajo Indian Reservation in Arizona,¹ set aside by treaty, pursuant to five valid and binding leases issued in 1964 and 1965 by the Navajo Tribe and approved by the

¹Petitioner, through its wholly-owned subsidiary Quivira Mining Company, also mines uranium from certain lands of the Navajo Indian Reservation in New Mexico set aside by executive order; however, the issue as to validity of tribal taxation of these activities is still pending in the United States District Court for the District of New Mexico. See footnote 3, *post*, and accompanying text.

References to the record in the New Mexico federal district court will be cited as "N.M. Docket No. —"; references to the record in the Arizona federal district court will be cited as "Ariz. Docket No. —".

Secretary of the Interior. N.M. Docket No. 19. Upon execution of the leases, cash bonuses exceeding \$335,000.00 were paid (N.M. Docket No. 19; Exhibits G-K), and petitioner has paid \$111,377.00 in rentals and \$7,539,490.00 in royalties on these five leases from February, 1967 through March, 1979. Jt. App. at 14; ¶26. In addition, as of April 30, 1979, petitioner had invested more than \$6,300,000.00 in capital improvements to these leaseholds. N.M. Docket No. 7; Walker affidavit.

The Navajo Tribe has never adopted a Constitution despite the fact that Congress has repeatedly invited it to do so. It refused to become organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and it also refused to become organized under Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636. To the contrary, it has acquiesced in the continued existence of the Navajo Tribal Council, a body created by the Secretary of the Interior on January 27, 1923, to facilitate the issuance of oil and gas leases.

In 1978, the Navajo Tribal Council adopted a Possessory Interest Tax ("PIT") and a Business Activity Tax ("BAT") because "Navajo revenues from royalties and other traditional sources of income are shrinking." Jt. App. at 38-48 and 48-64. Both of these taxes purport to empower the Navajo Tax Commission to impose a number of penalties in the event of noncompliance, including "permanent loss of all right to engage in productive activity" on the reservation. Jt. App. at 46; ¶17, and at 63; ¶26. Neither of these taxes was ever approved by the Secretary of the Interior. Jt. App. at 73; ¶8.

The Business Activity Tax purports to require petitioner: (1) to file declarations of tax due on February

15, May 15, August 15 and November 15 of each calendar year, (2) to pay taxes purportedly due on the said dates, and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax purports to be effective as of July 1, 1978, and purports to apply to every sale, either within or without the reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%). Jt. App. at 52-64.

The Possessory Interest Tax purports to require petitioner: (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one-half (1/2) due on February 15 and one-half (1/2) due on August 15 of each calendar year. The tax purports to apply to every leasehold interest on or under the reservation that has a value in excess of \$100,000.00 at a rate of not less than one percent (1%) nor greater than ten percent (10%) of the leasehold value. Jt. App. at 41-48.

On May 10, 1979, petitioner filed its complaint in the United States District Court for the District of New Mexico against the Navajo Tribe, the Navajo Tax Commission, the tribal chairman and the director and members of the tribal tax commission, seeking a declaration that the Business Activity Tax and Possessory Interest Tax were void and invalid, as well as an injunction enjoining any enforcement of these taxes. N.M. Docket No. 1. Petitioner alleged that the respondent tribal officials, by seeking to enforce the taxes, were acting beyond the limits of

their lawful tribal authority. Jurisdiction was asserted under 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

On September 27, 1979, the Honorable E. L. Mechem dismissed petitioner's claims against the Navajo Tribe and the Navajo Tax Commission on the basis of tribal sovereign immunity.² N.M. Docket No. 14. On March 12, 1980, Judge Mechem transferred, over petitioner's objections, petitioner's action insofar as it pertained to petitioner's oil and gas leases in Arizona to the United States District Court for the District of Arizona.³ N.M. Docket No. 17; Ariz. Docket No. 1.

All activity in the Arizona district court was stayed pending resolution by this Court of the then pending case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Ariz. Docket No. 14. After the *Merrion* decision was released, the Arizona district court entertained motions for summary judgment that had been filed by both petitioner and respondents. Ariz. Docket Nos. 2 and 17. On June 29, 1982, the Honorable William P. Copple rendered his memorandum and order (Pet. App. B at 1-23) which granted summary judgment in favor of petitioner on the basis that the Business Activity Tax and the Possessory Interest Tax were void and invalid because they had not

²Although Justice Blackmun has suggested that the doctrine of tribal sovereign immunity "may well merit re-examination in an appropriate case", *Puyallup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165, 179 (1977) (concurring), petitioner has not challenged this holding. Instead, it has pursued its claims against tribal officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

³The portion of petitioner's action relating to the New Mexico uranium leases was retained in the United States District Court for the District of New Mexico, which stayed the action on its own motion over petitioner's objections.

been approved by the Secretary of the Interior. The district court rejected all of petitioner's other claims.⁴

The respondents appealed the determination as to Secretarial approval to the Ninth Circuit Court of Appeals. Ariz. Docket Nos. 28 and 38. Petitioner filed a cross-appeal of the district court's rejection of the federal pre-emption, treaty limitations on tribal power and Commerce Clause claims. Ariz. Docket Nos. 30 and 39. The United States filed an *amicus curiae* brief in support of the respondents' position, and urged that Secretarial approval was not required for tax ordinances imposed by Indian tribes that have no Constitutions and that have rejected the self-government provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476 and 477. Oral argument was held in San Francisco on April 15, 1983. Later that day, the three judge panel deferred submission pending decision by the Tenth Circuit Court of Appeals in the *Southland Royalty Co.* case.

On August 22, 1983, the Tenth Circuit reversed the determination by the federal district court in Utah that the respondents' taxes required Secretarial approval. *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir.). That case is still pending, however, be-

⁴Judge Copple held that *Merrion* required dismissal of the claims in Count I (lack of inherent power) and Count IV (breach of contract). Pet. App. B at 17. He also dismissed the claims in Count II (treaty limitations on tribal tax power), Count III (pre-emption), Counts V, VI and VII (Commerce Clause limitations) and Count VIII (due process and equal protection). Pet. App. B at 18-22. Judge Copple did not reject the equal protection and due process claims on their merits, but rather on the grounds that "the tribe is . . . unconstrained by constitutional provisions" and that "federal courts do not have jurisdiction to hear claims brought under § 1302 of the ICRA." Pet. App. B at 21.

fore the Tenth Circuit Court of Appeals on a petition for rehearing en banc.

The Ninth Circuit rendered its decision on April 17, 1984. The three judge panel—apparently disregarding this Court's holding in *Merrion* that Secretarial approval was necessary "[to] minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies," 455 U.S. at 141—held that:

Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters.

Pet. App. A at 12. In addition, the panel rejected petitioner's pre-emption claim by holding that—notwithstanding the *explicit* distinction between organized and unorganized tribes that Congress drew in 25 U.S.C. § 396b—the purpose of that legislation:

was not to generate distinctions between tribes organized under the IRA and tribes not so organized. . . .

Pet. App. A at 6.

Petitioner timely filed its petition for writ of certiorari on July 12, 1984; this Court granted the petition on October 9, 1984.

SUMMARY OF ARGUMENT

This Court has repeatedly acknowledged that intercourse between Indian tribes and non-Indians has traditionally been regulated and supervised by the federal government and that "The dependent status of Indian tribes with-

in our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *United States v. Wheeler*, 435 U.S. 313, 326 (1978). Thus, it is no surprise that this Court has held that tribal taxes on non-Indian oil and gas lessees are subject to the constraint of approval by the Secretary of the Interior "[to] minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies", *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), as well as to comply with "the administrative process established by Congress to monitor such exercises of tribal authority." *Id.* at 155.

The Ninth Circuit, however, held that the Possessory Interest Tax and the Business Activity Tax enacted by the Navajo Tribe do not need Secretarial approval because federal supervision no longer exists over the minority of Indian tribes in this country which, like the Navajo Tribe, have refused to adopt a Constitution under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* This conclusion ignores the very reasons why Secretarial approval is required—reasons that are all the more critical in the case of an Indian tribe whose powers, in addition to not being limited by the Constitution of the United States, are not even limited by a tribal Constitution. Furthermore, the Ninth Circuit's interpretation of the Indian Reorganization Act as a vehicle that limits the exercise of tribal power ignores the purpose, logic and legislative history of the Act, which was intended gradually to reduce federal supervision over those tribes that adopted Constitutions or Charters—not to deceive those tribes into subjecting themselves to even greater federal control and supervision.

The Ninth Circuit also ignored the *explicit* exceptions drawn by Congress in 25 U.S.C. § 396b and by the Secretary of the Interior in 25 C.F.R. § 211.29 to enable those Indian tribes which have adopted Constitutions or Charters under the Indian Reorganization Act of 1934 to supercede the comprehensive regulatory authority that Congress otherwise vested exclusively in the Secretary pursuant to 25 U.S.C. § 396d. Thus, although the federal statutes and regulations require Secretarial approval before oil and gas leases can be either issued or canceled, the Ninth Circuit has held that the Navajo Tribe, by enactment of the Possessory Interest Tax and Business Activity Tax without any federal supervision or approval, may unilaterally cancel oil and gas leases that it unilaterally could not have even issued.

The obvious effect of this decision is to trivialize this Court's decision in *Merrion v. Jicarilla Apache Tribe* and to emasculate the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* The ineluctable result of the decision below is that every Indian tribe that has followed the Congressional policy of the Indian Reorganization Act and has adopted a Constitution will now be encouraged to disorganize, to abandon their Constitutions and to forsake the Indian Reorganization Act so as to circumvent the Congressionally established scheme of extensive federal supervision over Indian/non-Indian relations that dates back to the very beginnings of this Nation.

ARGUMENT

I. Unorganized Indian Tribes Cannot Tax Non-Indians Without Federal Supervision And Approval.

Extensive federal supervision and approval of trade and intercourse between Indian tribes and non-Indians is deeply rooted in the very beginnings of this Nation. Justice Blackmun's recent observation in *Rice v. Rehner*, — U.S. —, 77 L.Ed.2d 961 (1983), that "Since 1790, see Act of July 22, 1790, 1 Stat. 137, the Federal Government has regulated trade with the Indians . . .", *Id.* at —, 77 L.Ed.2d at 980 (dissenting) can be extended to the period before this Nation had even earned its independence, for this Court had held in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), that Indian tribes in 1773 and 1775 could not, without approval from the sovereign to which they were then dependent, convey their land to non-Indians. See also *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("To assure adequate government of the Indian tribes it [the Congress] enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs."). In fact, the lack of federal approval has been used on behalf of the United States and some tribes as a basis for invalidating earlier tribal transactions with non-Indians. *E.g.*, *County of Oneida v. Oneida Indian Nation of New York State*, No. 83-1065; *United States v. Candelaria*, 271 U.S. 432 (1926) (invalidating conveyance); *Lawrence v. United States*, 381 F.2d 989 (9th Cir. 1967) (invalidating lease); *United States v. Emmons*, 351 F.2d 603 (9th Cir. 1965) (invalidating lease); *Leaf v. Udall*, 235

F. Supp. 366 (N.D. Cal. 1964) (invalidating contract for legal services).⁵

The present case is an extraordinary departure from that tradition and statutory scheme of federal supervision and control. The five oil and gas leases pursuant to which petitioner extracts oil and gas were, with Secretarial approval, issued under 25 U.S.C. §§ 396a *et seq.* These statutes are part of the extensive statutory scheme by which non-Indian activities on Indian lands have been traditionally regulated by the federal government for nearly 200 years.⁶ Without a single citation of authority, however, the Ninth Circuit concluded that federal supervision and

⁵In fact, in *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.*, 734 F.2d 1402 (10th Cir.), cert. granted, — U.S. —, as reprinted in 53 U.S.L.W. 3269 (1984), the Tenth Circuit adopted the Indians' argument that specific Congressional approval, not just approval by the Secretary of the Interior, was necessary for validity of a right-of-way across tribal lands.

⁶Virtually the entirety of Title 25 is dedicated to supervision by the federal government over Indian affairs, with particular emphasis on dealings between Indians and non-Indians. See, e.g., 25 U.S.C. § 81 (contracts between Indian tribes and non-Indians), §§ 81a and b (contracts between Indian tribes and lawyers for prosecution of claims against United States), § 84 (assignment of contracts), § 85 (contracts regarding tribal funds and property in the hands of the United States), §§ 261 and 262 (regulation of Indian traders), §§ 311, 312, 319, 321 and 323 (rights-of-way), § 320 (acquisition of Indian lands for reservoirs and materials), § 379 (sale of allotted lands), §§ 396a-g and 399 (leasing of Indian lands for mining purposes), § 397 (leasing of Indian lands for oil and gas purposes), § 402a (leasing of Indian lands for farming purposes), §§ 406 and 407 (sale of timber on Indian lands), § 415 (lease of Indian lands for public, religious, educational, recreational, residential, business, and other purposes), and § 452 (contracts with the State for educational, medical attention, relief and social welfare of Indians).

approval is necessary only when an Indian tribe so desires it:

Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, by-laws or charters.

Pet. App. A at 12. This notion that Indian tribes are free from all but self-imposed regulation was explicitly rejected in *Rice v. Rehner*, *supra*, where Justice O'Connor explained that:

Congress did not intend to make tribal members "super-citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations.

— U.S. at —, 77 L.Ed.2d at 979. *See also United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("The dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations."). Moreover, in addressing the issue of Secretarial approval, the Ninth Circuit completely ignored this Court's recent decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

In *Merrion*, this Court specifically held that organized Indian tribes could, *with the approval of the Secretary of the Interior*, impose taxes on non-Indian production of oil and gas from the reservation. Justice Marshall explained that while "neither the Tribe's Constitution nor the federal Constitution is the font of any sovereign power of the Indian tribes," 455 U.S. at 148 n.14, an amendment to the tribal Constitution authorizing the tax was "the critical event necessary to effectuate the tax." *Id.* (emphasis by the Court). This Court could not possibly have been more explicit in holding that adoption of a Constitution or Charter under Sections 16 or 17 of the Indian Reorganiza-

tion Act of 1934, 25 U.S.C. § 476 or § 477 [hereinafter referred to as the "IRA"], as well as Secretarial approval of the tribal tax, were part of "the administrative process established by Congress to monitor such exercises of tribal authority":

Here, the Congress has affirmatively acted by providing a series of federal checkpoints that *must* be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe *must* obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax non-members. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe *was required again* to obtain approval from the Secretary.

455 U.S. at 155 (emphasis added). Indeed, in distinguishing tribal taxation from federal and state taxation,⁷ this Court explained that:

These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 141.

Justice Marshall's concern that tribal tax powers could be exercised in an unfair or unprincipled manner is entirely consistent with the fact that Indian tribes, unlike every other governmental entity in the United States, are not subject to the constraints on the exercise of govern-

⁷As Justice Brennan acknowledged in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), "[I]t is now clear that Indian reservations do not partake of the full territorial sovereignty of states or foreign countries." *Id.* at 165 (dissenting).

mental authority set forth in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). Nor are the constraints set forth in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.*, capable of limiting exercises of tribal civil authority over non-Indians.⁸ As this Court held in *Santa Clara Pueblo, supra*, the writ of habeas corpus is the only way in which the Indian Civil Rights Act provisions can be enforced;⁹ and as

⁸In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), the Tenth Circuit held that federal court jurisdiction under the ICRA should not be limited where (1) no other relief or remedy is available, (2) the issues are not related to internal tribal affairs, and (3) the issue concerns a non-Indian. 623 F.2d at 685. See also *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, — U.S. —, as reprinted in 53 U.S.L.W. 3167 (September 10, 1984) (opinion of Rehnquist, J., staying mandate of Ninth Circuit Court of Appeals). The district court, however, rejected the reasoning of the *Dry Creek Lodge* decision. Pet. App. B at 22. The Ninth Circuit has also rejected the *Dry Creek Lodge* decision. E.g., *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), pet. for cert. filed, 52 U.S.L.W. 3846 (1984); *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278 (9th Cir. 1981); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980).

⁹The writ of habeas corpus is a meaningless remedy to non-Indians since they are not subject to the "criminal" jurisdiction of Indian tribes. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). This is especially true since some tribes are now enacting ordinances that provide for "criminal" punishment of offenses committed by an Indian, but which provide for "civil" punishment (*viz.*, fines or forfeitures) of identical offenses committed by non-Indians. See, e.g., *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418 (D. Ariz. 1981), rev'd, 710 F.2d 587 (9th Cir. 1983), cert. denied, — U.S. —, as reprinted in 52 U.S.L.W. 3720 (1984). According to respondents, this elevation of form over substance is permissible since that is "what the tribe is required to do by the holding of this Court in *Oliphant* . . ." Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 18 n.4.

Justice White observed, the writ of habeas corpus "is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion or just compensation for the taking of property." 436 U.S. at 75 n.3 (dissenting). Federal supervision and approval of tribal taxes or other exercises of tribal "civil" authority over non-Indians provide the only check and balance against exercise of the type of unfair or unprincipled power that the Framers of the Constitution found so objectionable. In fact, federal supervision and approval of tribal affairs is necessary to avoid intolerable tension and conflict between Indians and non-Indians.¹⁰

Federal supervision and approval of tribal taxes is hardly a recent phenomenon. This is clear from each of the three early cases pre-dating the IRA upon which the *Merrion* Court relied¹¹ to uphold the validity of the feder-

¹⁰This Court may take judicial notice of *Moapa Band of Paiute Indians v. U.S. Department of the Interior*, No. 84-1593 (9th Cir. argued on October 5, 1984), where the Moapa Indian Tribe is complaining about the Secretary's refusal to approve a tribal ordinance authorizing and promoting brothels on the reservation. Of course, under the rule of law announced by the Ninth Circuit in the present case, the Moapa Indian Tribe would not be required to obtain federal approval of its prostitution ventures if it did not want to be subject to such a requirement.

¹¹The *Merrion* Court also cited a post-Indian Reorganization Act case, *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), as further support for the validity of the federally approved severance tax of the Jicarilla Apache Tribe. 455 U.S. at 145 n.9. In that case, the Eighth Circuit observed that the tribal tax was "taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C. § 476." 259 F.2d at 556, quoting from *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d

(Continued on next page)

ally approved severance tax of the Jicarilla Apache Tribe. 455 U.S. at 141-144. In both *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Ind. Terr.), *aff'd*, 105 Fed. 1003 (8th Cir. 1900), and *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Courts emphasized the important role of federal supervision. In *Maxey*, Judge Clayton had explained that:

The superintending control of the interior department over the Creeks is nowhere abolished, but on the contrary all recent legislation has confirmed and even enlarged it. . . .

54 S.W. at 810. He then referred, as an example, to the Curtis Act, 20 Stat. 495, which he concluded "from beginning to end recognizes this continued authority of the interior department, and in many cases enlarges it." *Id.* In *Morris v. Hitchcock*, this Court pointed out that the tax enacted by the Chickasaw Tribe had been "sanctioned by the President of the United States on May 15, 1902." 194 U.S. at 393. Justice Edward D. White explained that Presidential review of such tribal tax legislation was "preventive of arbitrary and injudicious action." *Id.* Finally,

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89, 99 (8th Cir. 1956). The earlier *Iron Crow* decision had approvingly affirmed the decision of the district court, which had explained that:

Pursuant to the provisions of the Indian Reorganization Act, the Ogallala Sioux Tribe adopted on December 14, 1935, a tribal constitution which was approved by the Secretary of the Interior on January 15, 1956. Article IV, Sec. 1 (h) of the constitution authorizes the Ogallala Sioux Tribal Council "to levy taxes upon members of the Ogallala Sioux Tribe and to require the performance of community labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the reservation."

Iron Crow v. Ogallala Sioux Tribe of the Pine Ridge Reservation, 129 F. Supp. 15, 24 (D.S.D. 1955) (emphasis added).

in *Buster v. Wright*, 135 Fed. 947 (9th Cir. 1905), *app. dismissed*, 203 U.S. 599 (1906), Judge Sanborn relied upon this Court's earlier decision in *Morris v. Hitchcock* and pointed out in the very first sentence of the opinion that the challenged permit tax enacted by the Creek Nation had been "approved by the President of the United States in the year 1900. . . ." 135 Fed. at 949. Judge Sanborn later explained that:

[T]he United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise.

Id. at 954.¹²

In recent years, both before and after *Merrion*, this Court has acknowledged the importance of Secretarial supervision and approval.¹³ For example, in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), Justice Brennan emphasized in his dissent that Secretarial approval of the tribal taxing ordinances was so significant as to render the tribal taxes preemptive of the state taxes:

The conflict with federal law is particularly evident on the present facts because the Secretary of the In-

¹²In fact, the extent of federal supervision and control in these three early cases is underscored by the fact that the United States, not the Indian tribe, was the only entity which could enforce the tribal taxes. See *Merrion*, *supra*, 455 U.S. at 183 n.37 (Stevens, J., dissenting).

¹³Critical of the *Merrion* petitioners' disregard for the fact that the Jicarilla Apache Tribe's severance tax had been federally approved, Justice Marshall observed that: "Curiously, they [the *Merrion* petitioners] attach virtually no significance to the fact that the Secretary also approved the tax ordinance that they challenge here." 455 U.S. at 150 n.16.

terior—acting pursuant to lawful regulations—has approved the tribal taxing and regulatory schemes at issue here. That approval, and the federal policies which underlie it, both enhances tribal authority and ousts inconsistent state law.

Id. at 172 (dissenting). In *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611 (1983), a hunting and fishing regulation case, Justice Marshall explained on behalf of a unanimous Court that “Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation’s resources.” *Id.* at —, 76 L.Ed.2d at 624. After recognizing that the tribal ordinances at issue had been federally approved, *Id.* at —, 76 L.Ed.2d at 615, the Court unanimously acknowledged that:

[F]ederal law *requires* the Secretary to review each of the Tribe’s hunting and fishing ordinances.

Id. at —, 76 L.Ed.2d at 623 (emphasis added). Indeed, in *United States v. Wheeler*, 435 U.S. 313 (1978), a case involving the Navajo Tribe, this Court acknowledged that “Pursuant to federal regulations, the present Tribal Code was approved by the Secretary of the Interior *before becoming effective.*” *Id.* at 327 (emphasis added). More recently, this Court held in *United States v. Mitchell*, — U.S. —, 77 L.Ed.2d 580 (1983), a timber case, that federal control over resources on Indian lands is so extensive that Indians could seek damages from the United States for inadequate supervision. According to Justice Marshall, “Virtually every stage of the process is under federal control.” *Id.* at —, 77 L.Ed.2d at 594-595.

Federal supervision and control is also confirmed by the understanding of both the Legislative and Executive Branches. The very Senate Report that this Court in

Merrion cited as congressional acknowledgement of an inherent tribal power to tax also acknowledged that such a power is “subject to the supervisory control of the Federal Government”. 455 U.S. at 139-140, *quoting from* S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879). And of course, virtually the entirety of Title 25 of the United States Code attests to the extensive scheme that the Congress, with few exceptions,¹⁴ has enacted for federal supervision and control over Indian affairs.

The understanding of both the Executive Branch and the Congress as to extensive federal supervision and control over Indian affairs is also very clear from the legislative history underlying enactment of the IRA. One of the principal authors of the legislation was Mr. John Collier, the Commissioner of Indian Affairs. 78 Cong. Rec. 11,127 (1934) (Remarks of Senator Shopstead). Upon introduction of the bill, Commissioner Collier stated that “The bill curbs Federal absolutism and provides Indian Home Rule under Federal guidance.” *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 18 (1934). He further explained that:

[The bill] deals with a number of matters which are of intense concern to all Indians without exception.

The first of these is Indian self-government or home rule, or participation in Indian business. At

¹⁴As discussed below at pages 23-32, the most significant reduction of federal supervision and control has been for those tribes which, unlike the Navajo Tribe, have availed themselves of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq. However, even that Act does not provide for total elimination of federal supervision and control.

present, such self-government or participation as the Indians may enjoy is a matter of privilege exclusively. It depends upon the whim of the administration. Fundamentally, under existing law, the Government's Indian Service is a system of absolutism.

The bill seeks to curb this administrative absolutism and *it provides the machinery for a progressive establishment of home rule by tribes or groups of Indians.*

Id. (Emphasis added). Similarly, the Senate Committee on Indian Affairs declared that the legislation was intended:

To stabilize the tribal organization of Indian tribes by vesting them with real, *though limited*, authority, and by prescribing *conditions which must be met by such tribal organizations.*

S.Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934) (emphasis added). These purposes were also articulated by the two sponsors of the legislation, Senator Wheeler and Representative Howard. See 78 Cong. Rec. 11,125 (1934) (Remarks of Senator Wheeler); and 78 Cong. Rec. 11,732 (1934) (Remarks of Representative Howard). In short, this legislative history demonstrates that the IRA was designed to provide the mechanism for tribal governments to assert greater authority over their own affairs with a reduced (but not eliminated) level of supervision from the federal government.¹⁵

¹⁵In expressing his support for the legislation, President Roosevelt emphatically declared in his April 28, 1934 letter to Congressman Howard that "We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government. . . ." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 8 (1934). Obviously, if Indian tribes

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The Navajo Tribe is an excellent paradigm of the pervasive federal control and supervision over Indian affairs. The Navajo Tribal Council was not even created by the Navajo Indians. To the contrary, it was created by the promulgation on January 27, 1923 of "Regulations Relating to the Navajo Tribe of Indians", which stated at section 3 that:

There shall be created a continuing body to be known and recognized as the "Navajo Tribal Council" with which administrative officers of the Government may directly deal in all matters affecting the tribe.

Young, *The Navajo Yearbook, Report No. viii, 1951-1961, A Decade of Progress* 393 (1961).¹⁶ The Council was formed by the Department of the Interior to facilitate the Secretary's supervision and control over development of oil and gas resources on the Reservation. *Id.* at 374-375. This is also confirmed by the November 24, 1936 resolution of the Tribal Council, which acknowledged that the Tribal Council had been established "for the sole purpose

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already had the right to exercise self-government, there would have been no reason for President Roosevelt's impassioned plea that the right of local self-government be extended to Indian tribes "without further delay."

¹⁶Hereinafter referred to as *The Navajo Yearbook*, this document is an official publication of the Department of the Interior, which reported in 8 volumes on the progress in carrying out the provisions of the Navajo-Hopi Long Range Rehabilitation Act, P.L. 81-474, 64 Stat. 44. This Court has previously relied on *The Navajo Yearbook* as an authoritative source of information about the Navajo Tribe. See, e.g., *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 691 n.17 (1965); *Williams v. Lee*, 358 U.S. 217, 222 n.8 (1958).

The 1923 rules creating the Navajo Tribal Council, together with all amendments including the 1938 rules, are set forth at pages 393 to 429 of *The Navajo Yearbook*.

of making oil and gas leases." *The Navajo Yearbook* at 378. (The text of this resolution, found in Littel, *Navajo Council Resolutions 1922-1951*, p. 63, is reproduced as Appendix A at the end of this brief.) In fact, the Commissioner of Indian Affairs acknowledged to the Secretary of the Interior in a March 23, 1937 memorandum that the Navajo Tribal Council "is an institution created by the secretary" and "Its authorities are derived from regulations." *The Navajo Yearbook* at 380.¹⁷ To this day, the Navajo Tribal Council remains a creation of the Department of the Interior; and it operates under the basic framework set forth in the "Rules for the Navajo Tribal Council" that were promulgated by the Secretary of the Interior on July 26, 1938.

¹⁷Actually, in contrast to the Jicarilla Apache Tribe, the Navajo Tribe never had any tribal government. When the territory occupied by the Navajos became part of the United States,

[T]he Navajo Tribe did not exist in the ordinary political sense. There was a group of people sharing a common language and culture, but political organization apparently did not extend beyond local bands led by headmen called *nnat'aanii*. The headmen enjoyed varying amounts of power based on their persuasive ability, but no powers of coercion were attached to the office; the position of headman was not hereditary, and coalitions of headmen were probably few and of short duration. In short, the Tribe did not constitute a political body.

* * *

In fact, lack of formal political organization, and especially of responsible tribal leadership, constituted a serious problem for American Military and administrative personnel charged with responsibility for treaty-making, control and program direction.

The Navajo Yearbook at 371. Petitioner respectfully directs the Court's attention to the fascinating discussion at pages 371 to 392 of *The Navajo Yearbook* about how the Department of the Interior created the Navajo Tribal Council out of thin air.

The Navajos can hardly argue that they were unaware of the ramifications of refusing to adopt a Constitution under the IRA. On March 12, 1934, the Commissioner of Indian Affairs, Mr. John Collier, met with the Navajo Tribal Council and explained that if the Navajos did not organize under the IRA, they would remain under the total and complete supervision and control of the Secretary of the Interior:

The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny every one of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.

In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have. He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner. There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. Now what we are seeking in this Title One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs. And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Fort Defiance, Arizona, March 12 and 13, 1934 (emphasis added). (The relevant text is excerpted from these minutes and reproduced as Appendix B at the end of this brief.¹⁸) At a meeting with tribal representatives one month later, Bureau of Indian Affairs official J.M. Stewart again explained that without the Indian Reorganization Act, the Navajos were subject to the complete control of the federal government:

HENRY TALLMAN: Mr. Chairman, haven't the Navajo people exercised self-government now, without a charter?

MR. STEWART: No, all your direction, your supervision, is by the Government. Even, for instance, this morning, the government told you you could have thirty policemen. *With self-government, you wouldn't have to ask Washington, you could put them on.*

¹⁸Three years later, Commissioner Collier confirmed the accuracy of these statements. *Survey of Conditions of Indians in the United States: Hearings on S.858 Before the Senate Comm. on Indian Affairs, 76th Cong., 1st Sess. 20,956 (1937).*

HENRY TALLMAN: It seems that we have a voice in a lot of matters we have already undertaken, such as the council election. We have a voice in the election of our head men. These have been recognized by the people.

MR. STEWART: You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. *You have no authority under the present set-up.*

HENRY TALLMAN: The reason I asked that, I thought that the way we take things in hand, now, that our voice has been recognized by the states, such as electing officers, and in many cases, don't we pay taxes indirectly on different things?

MR. STEWART: On food stuffs, I imagine, and such things as cigarettes and gasoline, but not real property taxes, land and buildings, and such things.

HENRY TALLMAN: Isn't it possible that the Navajos can get by without a charter?

MR. STEWART: Of course, any Indian tribe can get by without it.

HENRY TALLMAN: I mean and still have power.

MR. STEWART: *No, in order to get the benefits, educational and other, there must be a charter granted. Now, that charter may be as told you by Mr. Collier at Fort Defiance. That may be just to give you the ordinary powers to begin with, and gradually work up in a period of years, to a greater control.*

Minutes of the Special Session of the Navajo Tribal Council, 6-7, held at Crownpoint, New Mexico, April 9-11, 1934 (emphasis added). (The relevant text is excerpted from these minutes and reproduced as Appendix C at the end of this brief.)

Although the Navajos wrote to Congressman Howard to express their approval of the legislation,¹⁹ they refused to adopt a Constitution under the IRA. *The Navajo Yearbook* at 377. And sure enough, less than two years later, a delegation of Navajos representing 27,000 Navajo Indians, or a majority of the then 50,000 Navajos, testified in support of two unsuccessful Senate bills which would either repeal the IRA or specifically exempt the Navajos from it. See S. 858, 75th Cong., 1st Sess. (1937); and S. 1736, 75th Cong., 1st Sess. (1937). They also petitioned Congress for "The granting of self-government to the Navajo people by a gradual, orderly, and systematic advance. . . ." *Survey of Conditions of Indians in the United States: Hearings on S.858 Before the Senate Comm. on Indian Affairs*, 76th Cong., 1st Sess. 20,915 (1937). Several years later, Bureau of Indian Affairs Superintendent J.M. Stewart acknowledged that Navajo tribal ordinances could not become effective without federal approval:

Mr. Stewart: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation, but the legislation is not effective unless approved by the President, except under certain conditions. *And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs.*

Minutes of Proceedings of the Meeting of the Navajo Tribal Council, 29-30, held at Window Rock, Arizona, June

¹⁹See April 12, 1934 letter from Thomas P. Dodge to the Hon. Edgar Howard, reprinted in *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 18 (1934).

26-29, 1948 (emphasis added). (The relevant text is excerpted from these minutes and reproduced as Appendix D at the end of this brief.)

To be sure, the Ninth Circuit correctly observed that "The purpose of the IRA was to *enable* and encourage Indian self-government." Pet. App. A at 12 (emphasis added). However, it then emasculated this purpose by construing the IRA as a *limitation* on the exercise of self-government by the majority of Indian tribes that have adopted its form of constitutional government.²⁰ According to the Ninth Circuit, those tribes which rejected the IRA are free of any limitations or constraints on taxing non-Indians,²¹ while those tribes that adopted IRA Constitutions must obtain Secretarial approval before taxing non-Indians. Indeed, the Tenth Circuit, whose holdings were adopted by the Ninth Circuit, readily acknowledged that this interpretation "may result in an advantage for tribes which have not adopted a constitution or charter under the IRA." *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 489 (10th Cir. 1983), *petition for rehearing pending*.

The purpose, logic and history behind the IRA confirm Justice Stevens' observation in *Merrion* that:

²⁰IRA Constitutions were accepted by 181 tribes and rejected by 77 tribes. Haas, *Ten Years of Tribal Government Under the I.R.A.*, p. 3 (United States Indian Service 1947). The Navajos were the only Indians among the 17 tribes in Arizona to refuse adoption of a Constitution under the IRA. *Id.* at 14.

²¹Obviously, the need for Secretarial approval is more pressing with those tribes which have not adopted any Constitution, since the "potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner . . .", *Merrion*, *supra*, 455 U.S. at 141, is most pronounced in those cases.

To the extent that the power to tax was an attribute of sovereignty possessed by Indian tribes when the Reorganization Act was passed, Congress intended the statute to preserve those powers *for all Indian tribes that adopted a formal organization under the Act*.

455 U.S. at 173 n.24 (dissenting) (emphasis added). No doubt Commissioner Collier would be astonished to learn that the legislation he championed "[to] provide[] the machinery for a progressive establishment of home rule by tribes or groups of Indians", *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 18 (1934), was instead a grand deception by which most Indian tribes in this country had subjected themselves to even greater federal control. No doubt President Roosevelt would be surprised to learn that his impassioned plea in support of the IRA that "We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government". H.R. Rep. No. 1804, 73d Cong., 2d Sess. 8 (1934), was utterly meaningless. In short, the Ninth Circuit's elimination of federal control and supervision over the Navajo Tribe²² by emasculating the purpose, logic and history of the IRA is simply untenable. *Cf. Escondido Mutual Water Co. v. LaJolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians*, — U.S. —, —, 80 L.Ed. 2d 753, 766 (1984) ("This effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive.").

²²That Congress has never intended to eliminate federal supervision over the Navajo Tribe is clear from H.R. Con. Res. 108, 67 Stat. B132 (1953), a resolution "Expressing the Sense of Congress that Certain Tribes Should Be Freed From Federal Supervision." In contrast to other tribes specifically identified in the resolution, the Navajo Tribe was not mentioned at all. See H.R. Rep. No. 841, 83d Cong., 1st Sess. 3-4 (1953).

II. Unorganized Indian Tribes Cannot Supersede The Extensive Federal Regulation Of Non-Indian Oil And Gas Lessees.

That the United States has complete and plenary power over Indian tribes and Indian affairs is well-established. *E.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). As a result, when the Congress enacts legislation, Indian tribes are not at liberty to circumvent it. This is precisely the teaching of *Kennerly v. District Court*, 400 U.S. 423 (1971) (per curiam), a decision that the Ninth Circuit completely overlooked in reaching its conclusion that 25 U.S.C. §§ 396a *et seq.* and the regulations promulgated thereunder allow unilateral tribal intervention in non-Indian oil and gas production.

In *Kennerly*, the Blackfeet Indian Tribe²³ had enacted an ordinance purporting to allow Montana State Courts to exercise concurrent jurisdiction along with tribal courts over lawsuits against tribal members. The Montana Supreme Court had held that "the transfer of jurisdiction by unilateral tribal action is consistent with the exercise of tribal powers of self-government. 154 Mont. 488, 466 P.2d 85." 400 U.S. at 426. This Court, however, rejected the notion that tribal self-government was sufficient to override an Act of Congress. After noting that Congress, by enactment of Public Law 280, 67 Stat. 589, had already spoken on the subject of jurisdiction, this Court held that:

The unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country

²³The Blackfeet Tribe, unlike the Navajo Tribe, was "duly organized under the Indian Reorganization Act of June 18, 1934. . . ." 440 U.S. at 509.

Id. at 427. Accordingly, this Court invalidated the tribal ordinance. See also *White v. Califano*, 437 F. Supp. 543, 551 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978).

In the present case, enactment of the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.*, is the "comprehensive legislation governing the leasing of tribal lands for mining purposes." Cohen, *Handbook of Federal Indian Law*, p.534 (1982 ed.). In fact, 25 U.S.C. § 396d requires all such oil and gas operations to be regulated by the Secretary of the Interior, not by Indian tribes:

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

The regulations promulgated by the Secretary appear at 25 C.F.R. Part 211, and they are as pervasive and comprehensive as the Indian educational institution regulations in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), and the timber leasing regulations in *United States v. Mitchell*, — U.S. —, 77 L.Ed.2d 580 (1983). They require Secretarial approval of the lease itself (25 C.F.R. § 211.2); they specify the procedure for bidding on oil and gas leases and reserve to the Secretary "the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing. . . ." (25 C.F.R. § 211.3); they require the lessee to file specific information and bonds with the Secretary (25 C.F.R. § 211.6); they permit the BIA superintendent to call for additional information from the lessees (25 C.F.R. § 211.7); except for tribes organized under the IRA, they require rental and other payments due under the leases "which have been or may be approved by the Secretary"

to be paid to the superintendent or other designee of the Secretary for the benefit of the lessors (25 C.F.R. § 211.12); they set the rental and royalty rates at \$1.25/acre and 12½% of value, respectively, but permit the Secretary to set higher rates²⁴ (25 C.F.R. § 211.13(a)); they specify when royalty payments are to be made (25 C.F.R. § 211.16); they specify that in calculating royalties, the Secretary shall make "a reasonable allowance for the cost of manufacture" (*Id.*); they permit the lessor to use gas in excess of the lessee's development and operation needs for tribal buildings (25 C.F.R. § 211.13(b)); they permit representatives from the Interior Department to inspect the leased premises and to inspect the lessee's books and records (25 C.F.R. § 211.18); they require that "the operations must be in accordance with the operating regulations promulgated by the Secretary" (25 C.F.R. § 211.20); they provide for penalties of cancellation or a \$500.00 daily penalty for failure to comply with provisions in either the lease or the regulations (25 C.F.R. § 211.22); they provide specific procedures for determination of violations of the lease or regulations (25 C.F.R. § 211.22); they require the leased lands, upon surrender or cancellation to be delivered to the Government (25 C.F.R. § 211.24); they permit leases to be assigned only with Secretarial approval (25 C.F.R. § 211.26); they provide that the lessor can take possession of the leased premises only after the Secretary, upon conclusion of a hearing, has declared the lease null and void (25 C.F.R. § 211.27); they require that the economic terms of the lease be respected:

²⁴For example, the royalties on petitioner's oil and gas leases are set at 16 2/3% instead of the ordinary 12½%. N.M. Docket No. 19; Exhibits G-K.

"no regulation made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the leases." (25 C.F.R. § 211.28); they require all lease documents to be on "forms prescribed by the Secretary of the Interior" (25 C.F.R. § 211.30); and *most importantly*, they permit only those tribes which have adopted Constitutions under the IRA, the Alaska Act of May 1, 1936, 48 U.S.C. § 362, 258a, or the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. §§ 501-509, to supercede Secretarial supervision and control (25 C.F.R. § 211.29).

Both the Business Activity Tax and the Possessory Interest Tax undermine the Secretary's supervision over oil and gas leases and purport to enable the Navajo Tribe unilaterally to determine how much economic exaction will be required in any given year. In fact, the ordinances permit the Navajo Tax Commission, at its discretion, to determine in any given year whether to apply the BAT at 4% to 8% (Jt. App. at 56; ¶6), and whether to apply the PIT at 1% to 10% (Jt. App. at 43; ¶7). Such unilateral adjustment disrupts the economic supervision and oversight responsibilities vested in the Secretary. See 25 C.F.R. §§ 211.3, 211.7, 211.12, 211.13(a), 211.13(b) and 211.28. In addition, the two taxes purport to enable *unilateral* imposition of fines and penalties by the Navajo Tribe itself. Jt. App. at 62-64; ¶¶24, 25, 26, 27 and 28, and at 45-47; ¶¶12, 13, 14, 17 and 19. Indeed, the taxes would in effect enable the Navajo Tribe unilaterally to cancel the leases under the "penalty" of "permanent loss of all rights to engage in productive activity within the Navajo Nation". Jt. App. at 63; ¶26, and at 46; ¶17. This renders the cancellation provisions in the regulations meaningless. The BAT

also eliminates the "reasonable allowance for the cost of manufacture" covered by 25 C.F.R. § 211.13(a); to the contrary, it permits deductions only for payments made to Navajos or to the Navajo Tribe. Jt. App. at 55-56; ¶5. Finally, the BAT and the PIT purport to enable the Navajo Tax Commission *unilaterally* to exercise "the power to attach and seize assets of a taxable person." Jt. App. at 59; ¶16, and at 46; ¶16. In short, these two tribal taxes purport to enable the Navajo Tribe to oust the Secretary of the Interior from the regulation of oil and gas operations that the Congress required in 25 U.S.C. § 396d.

In *Merrion*, however, this Court acknowledged that there was one significant exception to this Congressional scheme of Secretarial supervision:

However, the proviso to 25 U.S.C. § 396b states that "the foregoing provisions *shall in no manner restrict the right of tribes . . . to lease lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by an Indian Tribe pursuant to sections 461, 462, 463, [464-475, 476-478], and 479 of this title.*"

455 U.S. at 150 (emphasis by the Supreme Court). This Court also recognized that:

The Secretary has implemented the substance of this provision by the following regulation:

"The regulations in this part may be superceded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, insofar as they are not superceded, shall apply to leases made by organized tribes if the validity of the lease depends up-

on the approval of the Secretary of the Interior." 25 C.F.R. § 171.29 (1980) [now recodified at 25 C.F.R. § 211.29].

455 U.S. at 150 n. 15. The Navajo Tribe clearly cannot take advantage of these legislative and administrative exceptions because it, unlike the Jicarilla Apache Tribe, has never adopted a Constitution or Charter under the IRA.

The Ninth Circuit, however, simply refused to acknowledge the *explicit* exception that both the Congress and the Secretary made for IRA tribes. It pretended to look to the purpose of the Mineral Leasing Act of 1938, which it concluded "was not to generate distinctions between tribes organized under the IRA and tribes not so organized," but rather was to "bring all mineral leasing matters in harmony with the IRA." Pet. App. A at 6. Nowhere, however, did the Ninth Circuit even attempt to explain how "harmonization" with the IRA could possibly be achieved by permitting *unorganized* tribes to exercise *without* Secretarial approval those powers that Congress permitted only *organized* tribes to exercise *with* Secretarial approval. In this regard, the Court of Appeals apparently disregarded its earlier discussion of the IRA, where it had explained that:

In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of the Interior, *where before the responsibility for such decisions was lodged in large part only with the Secretary.*

Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112 (9th Cir. 1981) (emphasis added), *amended*, 665 F.2d 1390 (1982). The Court of Appeals also overlooked the observation it had made only 14 days earlier in *Blackfeet*

Tribe of Indians v. State of Montana, 729 F.2d 1192 (9th Cir.), *cert. granted*, — U.S. —, *as reprinted in* 53 U.S.L.W. 3235 (1984), that by enacting the IRA, "Congress intended to effectuate increased tribal independence and economic power, but did not envision giving up federal responsibility for supervising these [oil and gas] developments and providing necessary services for the Indians. . . ." 729 F.2d at 1198 n. 5. The explicit exception for IRA tribes drawn by Congress itself in 25 U.S.C. § 396b clearly illustrates that Congress specifically intended that IRA tribes were to be given greater authority over oil and gas leases than non-IRA tribes.

Nor do the Ninth Circuit's other arguments justify its disregard for the explicit distinctions between IRA and non-IRA tribes drawn by Congress and the Secretary. The argument that there was no statutory authority at the time 25 U.S.C. §§ 396a *et seq.* was proposed "to lease lands on Indian Reservations created by executive order for mineral development (except oil and gas)", Pet. App. A at 6, is of no significance whatsoever since petitioner's oil and gas leases are on lands of the Navajo Reservation set aside by *treaty* for which statutory authority had previously been enacted in 1891. See 25 U.S.C. § 397.²⁵ Indeed, the

²⁵The language "bought and paid for" in 25 U.S.C. § 397 has been interpreted as making the statute applicable to any lands acquired by exchange, not exclusively "through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights." *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 164 (1936). See also Letter from Acting Secretary Charles West to the Speaker, House of Representatives (June 17, 1937), *reprinted in* H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938).

Ninth Circuit's reasoning overlooks the historical fact that the very reason for creation of the Navajo Tribal Council was to facilitate oil and gas leasing on the Navajo Reservation. See pages 25-36, *ante*. Finally, the Court of Appeals' argument that there is "nothing in the Mineral Leasing Act which inhibits the Tribe's inherent ability to tax as an essential attribute of sovereignty", Pet. App. A at 7, is defective because it assumes that the Navajo Tribe has an inherent right to be free of federal supervision. This was certainly not the case in *Kennerly v. District Court, supra*, where even an IRA tribe discovered that it did not have the power unilaterally to specify how jurisdiction could be exercised on its Reservation. Nor was this the case in *Merrion, supra*, where Justice Marshall explained that while an Indian tribe may have an inherent power to tax, the *exercise* of that power must fulfill "the administrative process established by Congress to monitor such exercises of tribal authority." 455 U.S. at 155.

The application of the Business Activity Tax and the Possessory Interest Tax by unilateral action of the Navajo Tribe unlawfully circumvents the regulatory authority that the Congress specifically vested in the Secretary of the Interior. 25 U.S.C. § 396d. Moreover, the exercise of *unilateral* tribal authority to tax, to impose fines and penalties and to cancel oil and gas leases will only serve in the long run to depress the value of oil, gas, mineral or other development on Indian lands, and thus, to depress the long-term revenues that Congress wished to maximize. See *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir.), *cert. denied*, — U.S. —, as reprinted in 52 U.S.L.W. 3461 (1983) (holding that unilateral tribal power to cancel commercial leases "could reduce the return to tribes from long-term commercial leases.").

CONCLUSION

Indian tribes are domestic dependent Nations which the Congress has placed for nearly 200 years under the control and supervision of the Secretary of the Interior. Thus, it was error for the Ninth Circuit to hold that the Navajo Tribe could unilaterally, without approval from the Secretary of the Interior, apply taxes against non-Indian oil and gas lessees with whom it could not even have contracted in the absence of Secretarial approval. It was also error for the Ninth Circuit to conclude that the Navajos' failure to adopt a Constitution under the IRA eliminated federal supervision and control, since the purpose of the IRA was to reduce federal supervision and control for those tribes that adopted Constitutions, not for those tribes that refused to do so.

The comprehensive statutory and regulatory scheme enacted by the Congress and implemented by the Secretary of the Interior for oil and gas leasing on Indian lands does not permit unilateral tribal intervention in those activities. Even the one exception for tribes that have adopted Constitutions under the IRA still requires Secretarial review and approval for tribal taxes against non-Indian lessees. It was error for the Ninth Circuit to conclude that there was never any intention "to generate distinctions between tribes organized under the IRA and tribes not so organized" (Pet. App. A at 13) when the distinction was explicitly expressed by both Congress and the Secretary in 25 U.S.C. § 396b and 25 C.F.R. § 211.29.

In conclusion, the Ninth Circuit has eliminated federal supervision and control precisely where it is most urgently needed. It has trivialized this Court's decision

in *Merrion v. Jicarilla Apache Tribe* by limiting its application to those tribes that adopted Constitutions or Charters under the IRA. Such a conclusion also trivializes the IRA, which was intended by Congress to reduce the level of federal supervision and control over those tribes which adopted Constitutions or Charters, not to eliminate federal supervision and control over those tribes which refused to adopt Constitutions or Charters. The Ninth Circuit's decision cannot be allowed to stand; it must be reversed, the Business Activity Tax and Possessory Interest Tax should be held void and invalid, and this Court should reaffirm the continuing supervision and control over Indian affairs that the Congress has required for nearly 200 years.

November 20, 1984

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APPENDIX TO BRIEF FOR PETITIONER

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APPENDIX A

**NAVAJO TRIBAL RESOLUTION, DATED
NOVEMBER 24, 1936**

WHEREAS, the Navajo Tribal Council was organized in 1923 under regulations adopted by the Government for the sole purpose of making oil and gas leases in behalf of the tribe;

WHEREAS, the authority of the Tribal Council under existing regulations to deal with tribal problems other than oil and gas leases is inadequate;

WHEREAS, there is a vital need for the Tribal Council to speak and act with authority for the tribe on all problems affecting the Navajo people;

WHEREAS, it is deemed that now is the proper time to organize a new Tribal Council that will represent the entire tribe and its needs;

THEREFORE, BE IT RESOLVED by the Navajo Tribal Council in council assembled that a new Tribal Council be organized as soon as practicable;

BE IT FURTHER RESOLVED that a committee consisting of the present members of the executive committee and the former chairmen of the Tribal Council be, and the same is hereby appointed for the purpose of calling a constitutional assembly for the purpose of considering and adopting a constitution or by-laws for the Navajo people.

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APPENDIX B

(p. a) MINUTES OF THE SPECIAL SESSION OF
THE
NAVAJO TRIBAL COUNCIL

held at

Fort Defiance, Arizona

March 12 and 13, 1934

The Navajo Tribal Council was convened in special session at Fort Defiance, Arizona, on Monday, March 12, 1934, with the following officials, delegates and alternates present:

Honorable John Collier, Commissioner of Indian Affairs.
Wm. Zimmerman, Assistant Commissioner.
Mr. Thomas Dodge, Chairman of the Council.
J. M. Stewart, Chief of the Land Division.
A. C. Monahan, Assistant to the Commissioner (Property).
Wm. H. Zeh, Acting Director of Forestry.
Robert Marshall, Director of Forestry.
Felix Cohen, Assistant to Solicitor, Interior Department.
Ward Shepard, Land Division, Washington, D.C.
W. V. Woehlke, Personal Representative of the Commissioner.
J. D. Lamont, Co-Ordinator, E.C.W.
Hugh Calkins, Regional Director, Soil Erosion Service.

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Louis C. Mueller, Chief Special Officer.
H. C. Neuffer, Supervising Engineer.
Mark Radcliffe, Field Agent.
Oliver LaFarge, President National Association of Indian Affairs.
Dr. C. J. Whitfield, Director of Research.
R. V. Boyle, Erosion Service.
Dewey Rierdon, Assistant District Road Supervisor.
A. H. Womack, Irrigation Foreman at Large.
Supt. Henry Roe Cloud, Superintendent Haskell Institute.
Charles Collier, Erosion Service.
R. M. Tisinger, State Supervisor of Indian Education, Arizona.
H. F. Patterson, Asst. State Supervisor of Indian Education, Arizona.
Miss Dorothy Ellis, Assistant Supervisor of Home Economics.
(p. b) John G. Hunter, Superintendent, Southern Navajo Agency.
S. F. Stacher, Superintendent, Eastern Navajo Agency.
E. R. McCray, Superintendent, Northern Navajo Agency.
J. E. Balmer, Superintendent, Western Navajo Agency.
E. H. Hammond, Superintendent, Hopi Indian Agency.
Theodore Hall, Superintendent, Leupp Indian Agency.
C. E. Faris, Superintendent U. S. Indian School, Santa Fe, New Mexico.
Guy Hobgood, Superintendent, Truxton Canyon Indian Agency.
D. E. Harbison, Forest Supervisor, Fort Defiance, Arizona.
A. G. Hutton, Extension Agent, Fort Defiance, Arizona.
Chee Dodge, Ex-Chairman of the Council.
Deschna Clahcheshillige, Ex-Chairman of the Council.

Avena M. Wade, Stenographer, Fort Defiance,
Arizona.

DELEGATES

ALTERNATES

Northern Navajo Jurisdiction, Shiprock, New Mexico.

J. C. Morgan

Boyd Peshlakai

Robert Martin

Bob Bekis

Allen Neshki

Sam Manuelito

Eastern Navajo Jurisdiction, Crown Point, New Mexico.

Becenti Bega

John Perry

Southern Navajo Jurisdiction, Fort Defiance, Arizona.

Henry Taliman

Jim Shirley

Albert Sandoval

Toadechenia Cheschillie

Frank Cadman

Denet Tso

Black Mustache

Leo Parker

Western Navajo Jurisdiction, Tuba City, Arizona.

Lee Bradley

Scott Preston

Geo. Bancroft

Billy Sawyer

Hopi Jurisdiction, Keams Canyon, Arizona.

Fred Nelson

Billy Pete

Leupp Jurisdiction, Leupp, Arizona.

Marcus Kanuho

Nal Nishi

Interpreters: Howard Gorman and Alfred Bowman.

(p. 1) CHAIRMAN:

The meeting will come to order. We will have the roll call.

(All delegates and alternates responded except Henry Taliman, Albert Sandoval and Marcus Kanuho.)

Members of the Council: The purpose of this meeting is several-fold. We all have heard of the new policy that is being set afoot by the new administration as far as the Indians are concerned and this new policy is embodied in what is termed the Wheeler-Howard Bill. The Commissioner is here to explain this bill to us and after

he has explained it to us then we will discuss it. Mr. Collier:

MR. COLLIER:

Friends, of the Council, and others here: As your Chairman has stated, there are a number of subjects to be dealt with at this meeting of the Tribal Council. There are important matters that just have to do with the Navajo Tribe, and then there is an important matter that is being laid before all the Indians, the Wheeler-Howard Bill. Your chairman has decided that the meeting will first deal with this Wheeler-Howard Bill, the bill that concerns all of the Indians.

I shall try to tell you about this bill, not giving too many details and not using up too much time. You all know the importance of the Constitution of the United States, which is the fundamental law of the life of the United States. This bill, which is being laid before the Indians, will be as important to them as the Constitution of the United States is to all of the people of this country. We believe that all of the Indians, when they understand the bill, will not only endorse it but will want it and will work and fight for it. It is our belief that even a thing as good as this is, as we believe it is, should not simply be put through Congress because we think it is good, but only because the Indians want it. And for that reason we have called great meetings of the Indians, or congresses, in many parts of the country, and I am going there, and the Assistant Commissioner and other members of the Indian Bureau Staff, are going to these meetings in Oklahoma and the northwest, the Dakotas and California, and all over.

The Navajo tribe is the largest of all the tribes with the largest area of land owned by any tribe and the bill will have an important bearing on the welfare of the Navajos, and therefore, we are laying it before you, as before the other Indians.

(p. 2) I want you first to understand that the bill represents the policy not only of the Indian Office, but of the Interior Department and of the Secretary of the Interior, Mr. Ickes, and in addition, the policy of the President, Mr. Roosevelt.

• • •

(p. 6) The final part of this bill which concerns you is the part dealing with what we call self-government. That is Title One of the bill. It is the only part of the bill that requires a detailed explanation so far as you are concerned.

I had hoped to finish this explanation before twelve o'clock. It may be I cannot finish it but I will go ahead until twelve.

But before coming down to the details of this Title One, let me talk with you about the condition at present. The Navajo Tribe has a Tribal Council and that Council meets and works in a regular way. And you all know that it is the policy of Secretary Ickes and myself for the Tribal Council to have all the power and build itself up in a great freedom. But if we had a different policy and wanted to smash your Tribal Council, destroy it, we could do it in one day. We could take away every bit of your authority and we could deny every one of you to sit in the council and do it as arbitrarily as we wanted to. If your present Council were in disagreement with us, we could

abolish that Council and appoint a new Council, hand picked, so every member of it would be our rubber stamp and do exactly as we told him. We could, if we wanted to, adopt a rule that prohibited you from meeting more than once every five years and you would have to obey it. Or if we wanted to be real devilish, we could adopt a rule that to be a member of the Tribal Council, you had to attend a meeting every day at Fort Defiance, otherwise you were not a member.

(p. 7) In other words, your self-government in the most important matters is simply a matter of what the Secretary of the Interior wants you to have. He can take it away whenever he gets ready. If I wanted, myself, to dispose of your oil property in some way you did not like, I could tell you that either you would be abolished or you were going to give me unlimited power to sign away your oil property and I would have the power to do it.

Now, that is the condition under which practically all of the Indians are living now, at the mercy of the Secretary and the Commissioner. There are a few exceptions, as in the case of most of the New Mexico Pueblos and the Osages of Oklahoma. They have certain rights under statute law, but otherwise the Indians are all situated like you are. Now what we are seeking in this Title One is to cure that situation and to place you where you will not be at the mercy of the Secretary of the Interior and the Commissioner of Indian Affairs. And by that I mean we want to give you the power so if you do not want to be at our mercy you won't have to be. If you want to stay at our mercy, you can stay there, but if you don't want to, you don't have to.

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APPENDIX C

MINUTES OF THE SPECIAL SESSION
of the
NAVAJO TRIBAL COUNCIL
held at
Crownpoint, New Mexico
April 9 to 11, 1934

The Navajo Tribal Council was convened in special session at Crownpoint, New Mexico, on Monday, April 9, 1934, with the following officials, delegates and alternates present:

Mr. Thomas Dodge, Chairman of the Council
 J. M. Stewart, Chief of the Land Division, Indian Office
 S. M. Dodd, Chief Finance Officer, Indian Office
 Hugh Calkins, Regional Director, Soil Erosion Service
 Louis C. Mueller, Chief Special Officer
 Mark Radcliffe, Field Agent
 Dr. C. J. Whitfield, Director of Research
 R. V. Boyle, Erosion Service
 John G. Hunter, Superintendent, Southern Navajo Agency
 S. F. Stacher, Superintendent, Eastern Navajo Agency
 E. R. McCray, Superintendent, Northern Navajo Agency
 J. E. Balmer, Superintendent, Western Navajo Agency
 E. H. Hammond, Superintendent, Hopi Indian Agency
 Theodore Hall, Superintendent, Leupp Indian Agency
 Chee Dodge, Ex-Chairman of the Council
 Dëshna Clahcheschillige, Ex-Chairman of the Council
 Aven M. Wade, Stenographer, Fort Defiance, Arizona
 Charles H. Smith, Stenographer, Crownpoint, N. Mexico.

DELEGATES**ALTERNATES**

Northern Navajo Jurisdiction, Shiprock, New Mexico.

J. C. Morgan
 Robert Martin
 Allen Neshki

Boyd Peshlakai
 Bob Bekis
 Sam Manuelito

Eastern Navajo Jurisdiction, Crownpoint, New Mexico.

Becenti Begay

Alfred Perry

(p. 2) **DELEGATES**

ALTERNATES

Southern Navajo Jurisdiction, Fort Defiance, Arizona.

Henry Tallman
 Albert Sandoval
 Frank Cadman
 Black Mustache

Jim Shirley
 Toadechenia Cheschillie
 Denet Tso
 Leo Parker

Western Navajo Jurisdiction, Tuba City, Arizona.

Lee Bradley
 Geo. Bancroft

Scott Preston
 Billy Sawyer

Hopi Jurisdiction, Keams Canyon, Arizona.

Fred Nelson

Billy Pete

Leupp Jurisdiction, Leupp, Arizona.

Marcus Kanuho

Nal Nishi

Interpreters: Alfred Bowman, John Foley, Howard Gorman and Julian Sandoval.

MR. DODGE:

The meeting will come to order. Before we proceed with business, I will call on Mr. Stacher to say a few words to us.

MR. STACHER (Interpreted by Alfred Bowman):

Friends, it is a pleasure to greet you here today. We feel highly honored that the Tribal Council selected this place for this meeting, and while we are limited for facilities to take care of this council, we are going to do the

best we can as our facilities will admit. We hope that your stay will be pleasant and profitable and that you will come again. We know that there are many subjects to be taken up, and we hope that you will give your very best attention and decisions in matters that will affect the Tribe, as this means a lot for the future. We hope to be able to take care of all the visitors and feed them over here. We are having a barbecue dinner which will be free to all, or we can feed you over at the Club. We will charge 50¢ for dinner and supper and 35¢ for breakfast. We want to furnish lodging to every one we can, and if you have not been assigned a bed, please see some of the committee at the office. (p. 3) Again we want to thank you for coming, and we hope that you will find your stay pleasant.

MR. DODGE:

The interpreters are Alfred Bowman, John Foley, Howard Gorman, and Julian Sandoval. The interpreters for today are: Alfred Bowman and John Foley. Before we proceed, we will have roll call. (Alfred Bowman proceeded to call roll)

MR. DODGE (Alfred Bowman, Interpreter):

The quorum is present for business. You all know that at the last Council meeting at Ft. Defiance, final action on the Wheeler-Howard Bill was deferred until this meeting. Hence, the main business of this meeting is to discuss and consider, and take final action on the Wheeler-Howard Bill, and in order that the provisions of the bill may be fully understood by the Council, I believe it will be a wise policy to have the bill read and translated—interpreted word for word. I think only in that way we can discover

any defects that may be in the Bill, if any. My intention was that I was going to read the Bill and interpret at the same time. However, Dr. Richards tells me that I should not use my eyes too much, so I will have to leave that responsibility to Mr. Stewart, who is here with us. So now I will call on Mr. Stewart to present any communications that he may have from Washington.

MR. STEWART (Interpreted by John Foley):

Mr. Chairman, Delegates, Alternates, assembled Indians, and white friends, it seems that I am in the Indian country more than I am in Washington, and I can assure you it is a pleasure to be out here more than I am in Washington.

At the Ft. Defiance meeting, resolution was passed relative to giving the Navajo Tribe a mounted police force. Also, at that meeting, although it was not discussed, the Indians and the white people assembled there were awaiting word as to the location of the Central Navajo Agency. On both matters I have a personal written message from Commissioner Collier to the Navajo Council and the Navajo Indians. I will read this message and then hand it to the interpreter to read it for you.

April 5, 1934.

TO THE NAVAJO TRIBAL COUNCIL AND THE NAVAJOS:

Mr. Stewart will bring you this message. If it were possible I should accompany him but the situation in Washington forbids me to leave.

(p. 4) We are putting all our strength behind the Navajo Boundary Bills as well as the Wheeler-Howard Bill. We have very good hopes for both of these

measures. The attitude of the Navajos in the matter of stock reduction and range control has proved to be of very great help, in pleading the case of the Boundary Bills. Indeed, I think it is going to be decisive, and that it will be the means of actually passing the Boundary Bills.

Mr. Stewart likewise will bring you the news that the mounted police for the reservation can, as we hoped, be paid for out of government funds. We are depending on the Council and the Chapters to take a great responsibility for making the work of these mounted police a complete success.

I am anxious for the Council to understand that in going to the Budget and Congress for a gratuity appropriation of nearly a million dollars for Navajo land purchase, we are making it harder to obtain favorable action on the Wheeler-Howard Bill, with its grant of money for land purchases for all the other tribes. For this among other reasons, I am hopeful that the Council will give a strong expression, in behalf of the Navajo tribe, urging Congress to enact the Wheeler-Howard Bill, which all the Indians need as greatly as the Navajos need the Boundary Bills. Of course, the Navajos likewise need the Wheeler-Howard Bill.

The final decision about locating the Navajo center was reached by Secretary Ickes today after Mr. Zimmerman and I had presented him our views and the views of the Joint Committee which made its survey some weeks ago. We hope and believe that the tribe as a whole is going to be pleased with the place of location and we know they are going to be pleased with the structures to be built at the Window Rock site.

I will interrupt myself here to say that there is no reason for reading the last three lines which relate to the name selected for the site, because it has been changed to "Nee Alneeng", which means "Center of the world" or

Navajo center of the world". The rest of this letter reads as follows:

All the people at the Washington Office join in sending you their hearty wishes.

JOHN COLLIER
Commissioner.

. . .

(p. 27) HENRY TALLMAN:

Mr. Chairman, haven't the Navajo people exercised self-government now, without a charter?

MR. STEWART:

No, all your direction, your supervision, is by the Government. Even, for instance, this morning, the government told you you could have thirty policemen. With self-government, you wouldn't have to ask Washington, you could put them on.

HENRY TALLMAN:

It seems that we have a voice in a lot of matters we have already undertaken such as the council election. We have a voice in the election of our head men. These have been recognized by the people.

MR. STEWART:

You have been allowed to have a council, hold your elections, etc., and Washington has sent representatives to talk with you, consult with you, get your views on things, but in the last analysis, the last showdown, it is the Bureau

in Washington that issues the orders to the superintendents, and the superintendents issue those orders to the Indians. You have no authority under the present set-up.

HENRY TALLMAN:

The reason I asked that, I thought that the way we take things in hand, now, that our voice has been recognized by the states, such as electing officers, and in many cases, don't we pay taxes indirectly on different things?

MR. STEWART:

On food stuffs, I imagine, and such things as cigarettes and gasoline, but not real property taxes, land and buildings, and such things.

HENRY TALLMAN:

Isn't it possible that the Navajos can get by without a charter?

MR. STEWART:

Of course, any Indian tribe can get by without it.

HENRY TALLMAN:

I mean and still have power.

MR. STEWART:

No, in order to get the benefits, educational and other, there must be a charter granted. Now, that charter may be as told you by Mr. Collier at Fort (p. 28) Defiance. That may be just to give you the ordinary powers to begin with, and gradually work up in a period of years, to a greater control.

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APPENDIX D

(p. 1) PROCEEDINGS OF THE MEETING OF THE NAVAJO TRIBAL COUNCIL

Window Rock, Arizona
June 26, 28 & 29, 1948

ROLL CALL

| District | Name | Precinct | Attendance |
|----------|---------------------|--------------------------|------------|
| 1 | Charley Young | Kleche | Present |
| 1 | Amos Singer | Kaibeto | Present |
| 1 | Yellow Lefthand | Coppermine | Absent |
| 1 | Tohonie Nez | Tomalea | Absent |
| 2 | Joe Fuller | Navajo Mountain | Present |
| 2 | Paul Begay | Inscription House | Present |
| 2 | H. T. Donald | Shonto | Present |
| 3 | Maxwell Yazzie | Tuba City | Present |
| 3 | Frank Goldtooth | Coal Mine Mesa | Present |
| 3 | Gilbert Yazzie | Bodaway House | Absent |
| 4 | Hosteen-Tse-Dah | Pinon | Absent |
| 4 | White Hair Begay | Forest Lake | Present |
| 4 | Oscar Yonne | Dennebito | Present |
| 5 | Paul Smith | Leupp | Absent |
| 5 | Tse Keskzzie Begay | Red Lake | Present |
| 5 | Hosteen Soni | Bird Springs | Absent |
| 5 | Roger Davis | Indian Wells | Present |
| 7 | Kenneth Williams | Jeddito | Present |
| 7 | Arthur Lee | Dilkon | Absent |
| 7 | Joe Nelson | Cedar Springs | Absent |
| 8 | Descheene | Chil chin Bito | Present |
| 8 | Frank Bradley | Kayenta | Absent |
| 8 | Nocki Begay | Dennehetso | Present |
| 8 | John Lee Simpson | Monument Valley (Oljato) | Absent |
| 9 | David Clah | Teec Nos Pos | Absent |
| 9 | Atsity Bitsui | Mexican Water | Present |
| 9 | Etsitty Betah White | Sweetwater | Present |
| 9 | Clark Gable | Rock Point | Present |
| 10 | George Hubbard | Nazlini | Present |
| 10 | Samuel W. Gorman | Salina | Present |

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| | | | |
|--------|-----------------------------|----------------------------|---------|
| | | Rough Rock (Many Farms) | |
| 10 | Selth Begay | | Present |
| 10 | Reed Wenny | Chinle | Absent |
| 11 | Howard W. Sorrell | Lukachukai | Present |
| 11 | Hosteen-Tsosie-Badani | Wheatfields | Present |
| 11 | Sam James | Round Rock | Present |
| 12 | Joe Duncan | Shiprock | Present |
| 12 | Vernon Washburn | Sanastee | Absent |
| 12 | Eddie Nakai | Aneth | Absent |
| 12 | Lee Tom | Red Rock | Present |
| 12 | Louis Bigman | Nava | Present |
| 13 | Don Gleason | Burnhams | Absent |
| (p. 2) | | | |
| 13 | Yellowman | Lower Fruitland | Present |
| 13 | Carl Johnson | Upper Fruitland | Absent |
| 14 | Dewey Etsitty | Mexican Springs | Present |
| 14 | Nelson Damon | Coyote Canyon | Present |
| 14 | Dan Keanie | Naschitti | Present |
| 14 | James Becenti | Tohatchi | Present |
| 15 | Herbert Becenti | Crownpoint | Present |
| 15 | Billy Becenti | Lake Valley | Present |
| 15 | Manuelito Begay | Bloomfields (Borrogo Pass) | Present |
| 15 | Fred Tsosie | Pueblo Pintado | Absent |
| 15 | Heronimo Castillo | Terreon | Present |
| 16 | Etcitty Ya Begay | Manuelito | Present |
| 16 | Charlie H. | Cheechilgethe (Two Wells) | Absent |
| 16 | Shorty Begay | Mariano Lake | Present |
| 17 | Naswood Begay | Cornfields | Absent |
| 17 | Willie Davis | Kinlichee | Absent |
| 17 | Billie Pete | Greasewood | Present |
| 17 | Howard Gorman | Ganado | Present |
| 17 | Tom Lincoln | Steamboat | Present |
| 17 | Harold Clark | Klagetoh | Present |
| 18 | Blind Billie | Sawmill | Present |
| 18 | Clyde Lizer | Fort Defiance | Present |
| 18 | Carl Mute | St. Michaels | Present |
| 18 | Aubrey Francisco | Crystal | Present |
| 18 | Jim Hale | Oak Springs | Present |
| 18 | Hosteen Nez Kimball | Houck | Absent |
| 19 | Lilly J. Neil | Carsons | Present |
| 19 | Fred Yazzie | Lybrooks-Nageezi | Present |
| | Ramah Davis Skeet | Ramah | Absent |
| | Puertocito Olson Apachito | Puertocito | Absent |
| | Canoncito Lorencito Platero | Canoncito | Absent |

INTERPRETERS

Paul Jones, Albert G. Sandoval, Sr., and Alfred Bowman

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The meeting was called to order June 26, 1948, by Sam Ahkeah, Chairman, Paul Jones interpreting. Forty-five delegates answered the roll call.

• • •

(p. 21) MORNING SESSION

Monday, June 28, 1948

The meeting was called to order at 1:20 P. M., Sam Ahkeah, Chairman, presiding, Albert G. Sandoval, Sr., interpreting.

CHAIRMAN: We have a quorum, 41 having answered roll call, so the Council meeting is now in order. I would like to say that if the members of the Council would maybe put on their best thinking cap we might go through with the different subjects before them now and maybe we will get through by some time tonight so we can go home as we all have pretty much to do at home.

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(p. 28) JOE DUNCAN, District 12: I am in full agreement with one of the speakers regarding the power the Council has. Heretofore we have been more or less forced to adopt different things for the people. After the Council approves it they turn around and say the council has no power, do not have the authority. That has been done heretofore. We hear from various points over the country that the Navajo Tribal Council has no power and we are being ridiculed by the public. They tell us what is the use going to Window Rock? You have no power. You are not recognized. Now whenever anyone, any of the government officials, are assigned to a position he is

given a certain amount of responsibility or power to be in that position, but with the Tribal Council that has never been shown. There are over 70 members of the Tribal Council and those 70 members have never been told they have any authority at all.

Now it has been stated by Mr. Davis that we are acquiring some kind of power step by step, but it appears to me that is not so. We may take several steps and after we have taken those steps we are told we have no power. Now suppose we should go and tell our people we have adopted this fund for acquiring some milk goats for the people. Then the people would want to know when is that coming and we may tell them some time in the future, in the fall, and after that has been done the Secretary will say we have no grazing permits to have those goats on the reservation, then what are we going to do about it. Now this subject was brought before us about three days ago, about getting goats for some of these people and we (p. 29) have not been told whether these goats have to have grazing permits. We have here Mr. Stewart, our superintendent, and Mr. Littell, our Tribal attorney. What we would like to know is when and if we are ever going to have any power, the Council. Mr. Littell has never said anything about that to us and we are paying Mr. Littell to be our attorney. Now we have hired Mr. Littell to be our legal advisor. What we would like to know is just where or whether or if there is any chance of the Council having any powers, or when, or is it that he is just going to come here time after time and sit before us and go back and say the Tribal Council has no power. These people sitting here as members of the Council have been discussing that among ourselves outside.

Why should we go into the Council House having no power, no authority? That is the reason for bringing this up now. So what we are anxious to know first is whether or not there is any chance of having power or if the officials will come out in the open with it and tell us just how far we can go with these things. And so I think it is foolish for the Council to be discussing anything like this without first knowing just how far they can go with it, how much authority they have, I want to know if you have anything on the book or any regulation to that effect?

MR. STEWART: We have too many books, I am sure of that.

JAMES BECENTI, District 14: There were two questions. Mr. Littell was questioned and also the Superintendent.

MR. STEWART: I will try to answer Joe to the best of my ability. As a matter of comparison let us take the Congress of the United States. It can enact legislation but the legislation is not effective unless approved by the President, except under certain conditions. And so it is with the Navajo Tribal Council. It can enact, if you wish, ordinances or resolutions, but it cannot put those into effect unless approved by the Secretary of the Interior or Commissioner of Indian Affairs. The situation is somewhat comparable to the Congress and the President, except for this condition. Congress does have the law and machinery whereby it can overcome or veto or a disapproval by the President. Now, it isn't quite true for you to believe that you do not have any power. You have the power of public assembly here, which is power number one. You have the power of making recommenda-

tions and passing resolutions which are in effect tribal laws or ordinances. You have those powers, at least, recent actions of the Department on your resolutions strongly indicate that you do not have the power of final action. My personal belief has been and still is, and I have urged the Tribal Council down through the years, to formulate a set of regulations of its own, call it a Constitution or a charter or anything you want to, whereby certain powers can be delegated to the Council from the Secretary of the Interior. Now there are certain powers that can be delegated to the Council by the Secretary of the Interior without an Act of Congress. There are other powers that must be delegated by an Act of Congress.

Now, to me, this resolution which has been read to you, is the first concrete attempt to open the door whereby the Navajo Tribal Council is conferred authority, and by that conference of authority it in turn confers (p. 30) authority upon the Advisory Committee. It is the first real step forward that I have seen. It certainly is not a waste of time here, today or Saturday, because through the adoption of this resolution and its acceptance by the Commissioner or the Secretary — and we have to go back to Washington again — but through the adoption of this resolution and the putting of this plan into operation thereafter, it will demonstrate to the Navajo people and to the Commissioner and to Congress whether or not the Navajo Tribal Council and Advisory Committee are proper people to be given authority to run a great many things concerning their affairs. This will be a trial document in many respects. Now I am personally so convinced that once this is put into effect that the actions of the Advisory Committee will show such profound thinking

and carefulness in the operation of this credit program, not only the small one proposed in this document, but the larger one we will get later on, that there will be no trouble at all in getting a delegation of larger authority from time to time to the Navajo Tribal Council. I have told this Council, not particularly you gentlemen but previous Councils, that as far as I can see all you have is a regulation that allows you to organize, period. Right there we stop. And that there should be a committee set up whereby developments could be made in terms of conferring authority on the Tribal Council by the Secretary of the Interior of those things he can delegate, and that that committee also consider rules for the conduct of the Tribal Council and report back to the Tribal Council of those determinations.

Now to answer Joe very directly. My personal feeling and understanding is that the Navajo Tribal Council does not have the authority to demand. It has only the authority to request. I think Roger pretty well put the situation. Let's get ready for the time when we can obtain greater authority on these larger topics.

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No. 84-68

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ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

— 0 —
KERR-McGEE CORPORATION,
Petitioner,

v.

THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

— 0 —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

— 0 —
BRIEF AMICUS CURIAE TEXACO, INC.

— 0 —
BRUCE DOUGLAS BLACK
CAMPBELL & BLACK, P.A.
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(505) 988-4421

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INTEREST OF AMICUS CURIAE

Texaco, Inc., produces oil and gas from a portion of the Navajo Indian Reservation located in the State of Utah. Texaco has 43 oil and gas leases authorizing it to produce oil and gas on the Navajo Reservation. These leases were entered into between the Navajo Tribe and Texaco, Inc., and were expressly approved by the United States Department of the Interior. Texaco, Inc. has invested over \$42,000,000 on the acquisition and development of these leaseholds.

In 1978, the Navajo tribal council adopted a business activity tax and a possessory interest tax. Both of these taxes purport to empower the Navajo tax commission to impose substantial penalties on Texaco in the event the Navajo tax commission determines that Texaco has not fully complied with the provisions of these tribal tax ordinances. Among the penalties are included the right to "attach and seize assets of the taxable person," and to terminate all their "rights to engage in productive activity within the Navajo Nation" (Navajo Tribal Code, Title 24, §§ 212, 418). Although Texaco's leases were initially approved, and have since been extensively regulated, by the Interior Department, it has refused to supervise, or even review, Navajo taxation of non-Indian mineral lessees.

In addition to its leases on the Navajo Reservation, Texaco and its subsidiaries have mineral leases, also approved by the Department of the Interior, with other Indian tribes. Some of these Indian tribes are considering, or are in the process of imposing, taxes on the productive activities of Texaco and its subsidiaries. If these tribal taxes, like the Navajo business activity and possessory interest taxes, are imposed without review and supervision

by the Secretary of the Interior, Texaco is fearful that it may be deprived of its constitutional and property rights.

SUMMARY OF ARGUMENT

The federal government has plenary authority over tribal lands and resources. Congress has delegated its authority to control the development of tribal property to the Secretary of the Interior. The Secretary of the Interior has a duty to review tribal resolutions which affect tribal resources and federal leases thereof. The Secretary of the Interior also has a duty to protect the Constitutional rights of non-Indians doing business on the reservation under federal authority. Tribal taxation of federal lessees is inconsistent with the status of Indian Tribes as domestic dependent sovereigns and ineffective without Secretarial approval.

ARGUMENT

Introduction

At least fifteen types of valuable minerals, including oil, gas, helium, coal, shale, uranium and zinc are known to exist in significant quantities on Indian reservations.¹ In 1975, the United States Government estimated that 33 Indian reservations contained between 100 and 200 billion tons of coal, which would constitute 7-13% of the nation's total identifiable reserves.² At that time Indian-held resources also accounted for over 15% of the total of all

¹Bennett, *Problems and Prospects in Developing Indian Communities*, 10 Ariz. L.R. 649, 660 (1968).

²Comptroller General's Report to the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., Management of Indian Natural Resources, Pt. 2, pp. 77-8 (Comm. Print. 1976).

mining on Federal lands. The Department of the Interior has estimated that the oil and gas reserves of 40 Indian Reservations amount to 4.2 billion barrels of oil and 17.5 trillion cubic feet of gas.³ Indian oil and gas leases were estimated in 1974 to cover a collective acreage of 4,187,644, and produce at least 30,685,000 barrels of oil and 125,080,000 mcf of gas annually.⁴ Such leases are increasing and the Navajo Tribe possesses abundant quantities of several of these strategic natural resources.⁵

In light of their belief that they were not being adequately compensated under the mineral leases approved by the Interior Department, the Navajo Tribe adopted a business activity tax and a possessory interest tax in 1978.⁶

³*Id.*

⁴Bureau of Competition, Report to the Federal Trade Commission on Mineral Leasing on Indian Lands, 11, 17, 47 (October, 1975).

⁵*Ibid.* at 10.

⁶Two members of the Navajo Tax Commission admitted that these taxes were designed to produce added income from what the Tribe perceived as "the existing inequitable lease arrangements." After so describing the goal of the Navajo possessory interest tax, the Navajo tax commissioners stated:

If lessees, faced with the prospect of a sizeable possessory interest tax, find it in their interest to renegotiate their existing leases, the tribal government is willing to do so, but until such time as the new lease is agreed upon, there should be a flow of additional revenues from the tax. *Ibid.* at p. 15.

(Williams and Cole, "Resource Revenue and Rights Reclamation: A Tax and Sulphur Emissions Program of the Navajo Nation," p. 3, March, 1978.)

The business activity tax is to be applied at a rate not less than 4% nor greater than 8%. § 401(b).⁷ The initial rate for the business activity tax was set at 5%. *Id.* It purports to apply to every sale, whether "within or without the Navajo Nation of Navajo goods or services". § 403(2) This tax was submitted to the Secretary of the Interior for approval, but he refused to pass upon the validity of the tax.

The possessory interest tax, adopted by the Navajo Tribal Council in January, 1978, would require any person having ownership rights in any lease granted by the Tribe to pay an annual tax on the value of the leasehold interest at a rate of between 1% and 10% of its value as assessed by the tribal tax commission. § 201 This rate, like that of the business tax, is subject to change by the Navajo tax commission. §§ 201, 401

Under the Navajo possessory interest tax, a taxpayer may be subjected to having "all rights to engage in productive activity within the Navajo Nation suspended by the [Navajo tax] commission and shall be subject to permanent loss of all rights to engage in productive activity with the Navajo Nation". § 214 It also allows the Navajo tax commission "to attach and seize assets of a taxable person." § 212 In addition to allowing the tribe to seize Texaco's assets and suspend its right to engage in business, the possessory interest tax allows the tribe to assess substantial penalties. It provides a penalty of up to one-half of one percent of the total value of the taxpayer's possessory interest, as assessed by the Tribe, for any taxpayer failing timely to file a declaration of taxable inter-

⁷All references to the specific sections of the business activity tax and the possessory interest tax are to the Navajo Tribal Code, Title 24 (1979 Supp.).

est. § 215 Another two-tenths of one percent of the value of the taxpayer's possessory interest may be assessed as a penalty by the commission for each month's delay in filing a tax declaration. (*Ibid.*)

The Navajo business activity tax also gives the Navajo tax commission the power to seize the taxpayer's assets and to terminate all the taxpayer's "rights to engage in productive activity within the Navajo Nation . . ." § 418 Additionally, the business activity tax provides that "[a] person required to provide information necessary or helpful for the assessment or collection of a tax who fails to do so may be fined up to \$5000 for each offense and may have all rights to engage in productive activity within the Navajo Nation suspended." § 421

Both the Navajo taxes also contain provisions providing penalties for any taxpayer who attempts to "defeat the tax". § 217

I.

The Secretary of the Interior has a duty to review and supervise tribal action which has an impact upon Indian resources and federal licensees.

A. The federal government has plenary authority over tribal lands and resources.

While the United States Constitution does not recognize Indian tribes as sovereign governmental entities, it does invest the Congress with the power to regulate and supervise Indian tribes and their activities, particularly with non-Indians.⁸ From its earliest days, Congress interpreted this Constitutional authority over Indian affairs

⁸While the Constitution only grants federal authority over "Indian tribes" specifically in relation to control over the regulation of commerce, Article I, § 8, Clause 3, plenary federal power over tribal activities and relations with non-Indians was

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broadly. As early as 1790, Congress voided sales of land by "any Indians, or any nation or tribe of Indians" without the consent of the United States.⁹ Other early enactments by Congress controlled travel¹⁰ and settlement¹¹ and every aspect of trade with Indians¹² by non-Indians in Indian territory.

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recognized as having roots in other constitutional provisions at an early date. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice John Marshall made reference to several Constitutional provisions in concluding Congress was vested with broad authority over Indian affairs, saying:

"That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties and of regulating commerce with foreign nations and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions." 31 U.S. (6 Pet.) at 559.

In his concurrence in *Worcester*, Justice McClean relied more upon the Property Clause (Article IV, § 3, Cl. 2) to authorize federal control over tribal reservations. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-8 (1823), *Oklahoma v. Atchison, T. & S.F. Ry.*, 220 U.S. 227, 285 (1911) and *Hallowell v. United States*, 221 U.S. 317, 324 (1911), also trace Congressional power over Indian reservations to the Property Clause. This Court has also found other Constitutional sources authorizing Congressional legislation relating to other specific Indian problems. *Morton v. Ruiz*, 415 U.S. 199 (1974) (Article I § 8 Cl. 1); *Ex parte Webb*, 225 U.S. 663 (1912) (Article IV § 3 Cl. 1); *United States v. Navarre*, 173 U.S. 77 (1899) (Article III § 1)

⁹Trade and Intercourse Act of July 22, 1790, Ch. 33, 1 Stat. 137, currently codified as 25 U.S.C. § 177 (1976). This Act continues to invalidate tribal attempts to transfer land without federal approval. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525 (2d Cir. 1983).

¹⁰Trade and Intercourse Act of 1876, Ch. 30, § 3, 1 Stat. 469, 470.

¹¹Trade and Intercourse Act of March 3, 1799, Ch. 46, § 4, 1 Stat. 743.

¹²Act of April 18, 1796, Ch. 13, § 4, 1 Stat. 452, 453; Trade and Intercourse Act of 1834, Ch. 161, § 3, 4 Stat. 729 (Current-

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Since the adoption of the Constitution, "the commonly shared presumption of Congress,¹³ the executive branch,¹⁴ and lower federal courts"¹⁵ (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)) has been that the federal government has virtually plenary power over Indian tribes, their land, and the resources thereof. This Court has also long recognized pervasive federal authority over Indian lands¹⁶ and the activities thereon.¹⁷

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ly 25 U.S.C. § 263). Contemporary writers also recognized that Congress must have the power to regulate commerce between Indians and non-Indians so that the federal government could prevent disputes between the two groups. See, e.g., *The Federalist* No. 3 at 16-17 (Wesleyan U.Ed. 1961).

¹³See e.g., 25 U.S.C. § 564; 25 U.S.C. § 903(a); 25 U.S.C. § 121-125; 25 U.S.C. § 311-328.

¹⁴*Regulation of Traders on the Navajo Reservation*, 60 I.D. 176 (1948); *Jurisdiction of Courts of the Choctaw Nation*, 7 Op. Atty.Gen. 174 (1855); Testimony of Carol E. Denkins, Assistant Attorney General, Department of Justice, on Ancient Indian Land Claims: Hearings before the Select Committee on Indian Affairs, 97th Cong., 2d Sess. 37 (1982).

¹⁵*Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979), cert. denied, 444 U.S. 995 (1979); *Menominee Tribe of Indians v. United States*, 607 F.2d 1335 (Ct. Cl. 1979), cert. denied, 445 U.S. 950 (1980); *Klamath & Modoc Tribes v. United States*, 436 F.2d 1008 (Ct. Cl. 1971), cert. denied, 404 U.S. 950 (1971); *Creek Nation v. United States*, 97 Ct. Cl. 591 (1942), aff'd, 318 U.S. 629 (1943); *United States v. Nelson*, 29 F. 202 (D. Alas. 1886), aff'd, 30 F. 112 (Or. Cir. 1887).

¹⁶*United States v. Sioux Nation*, 448 U.S. 371 (1980); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), reh. denied, 348 U.S. 965 (1955); *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584 (1977); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442 (1920); *United States v. Bd of County Commr's Osage County*, 251 U.S. 128 (1919); *Marchie Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Blackfeather v. United States*, 190 U.S. 368 (1903); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

¹⁷*United States v. Antelope*, 430 U.S. 641 (1977); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *United States v. Nice*,

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B. The Secretary of the Interior has a duty to review Tribal resolutions which affect Tribal resources and federal leases thereof.

The federal government has a property interest in Indian lands and the Secretary of the Interior has a duty to manage those lands not only for benefit of the Indians but also the public at large.¹⁸ Under federal law the Secretary of the Interior has a general duty to "make the tribal property productive"¹⁹ and therefore to supervise every aspect vital to the development of tribal resources.²⁰ In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) this Court recognized, "Federal law commits to the Secretary and the tribal council the responsibility to manage the reservation's resources." Although the resource involved in the *Mescalero* case was game rather than oil, this Court found: "Federal law requires the Secretary to

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241 U.S. 591 (1916); *United States v. Waller*, 243 U.S. 452 (1917); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890); *Stevens v. Cherokee Nation*, 174 U.S. 445, 478 (1899); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876).

¹⁸*Tee-Hit-Ton Indians v. United States*, *supra*; *Starr v. Long Jim*, 227 U.S. 613, 625 (1913); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *United States v. Rodgers*, 45 U.S. (4 How.) 567 (1846); *State of California by and through Brown v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); see also 43 U.S.C. § 1457.

¹⁹*Cherokee Nation v. Hitchcock*, 187 U.S. 294 at 307 (1902).

²⁰*United States v. Mitchell (Mitchell II)*, 102 S. Ct. 2961, 77 L.Ed.2d 580 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *People v. McCovey*, 205 Cal. Rptr. 643, 685 P.2d 687 (1984).

review each of the tribe's hunting and fishing ordinances." 462 U.S. at 615. Tribal action impacting the development of tribal property or resources therefor requires Secretarial approval and implementation.²¹

The necessity for Secretarial involvement in tribal taxes on the value of, and the business generated from, oil and gas leases specifically authorized by the Interior Department is even more clear. The courts have recognized that the Secretary has a duty to comprehensively regulate mineral production on Indian leases for the benefit of both the public and Indian tribes.²² The Interior Department has therefore traditionally been integrally involved in every aspect of oil and gas development on Indian reservations.²³ Moreover, Section 396(d) of the Indian Mineral Leasing Act²⁴ makes it clear Congress intends the Secretary to directly regulate "all operations under oil or gas, or other such mineral lease issued pursuant to the terms" of the Act. The Secretary of the Interior has recognized his obligations to implement the In-

²¹25 U.S.C. §§ 81, 415, 121-125, 311-321 (1976); *Jurisdiction of Courts of the Choctaw Nation*, 7 Op. Atty. Gen. 174 (1855); *Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645 (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs* (June 3, 1941).

²²*United States v. Mitchell*, *supra*; *Kenai Oil & Gas, Inc. v. Dept. of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980); *Hoover & Bracken Energies v. United States Dept. of Interior*, 723 F.2d 1488 (10th Cir. 1983), *cert. denied*, 83 L.Ed.2d 39 (1984).

²³*Boesche v. Udall*, 373 U.S. 472 (1963); *Cherokee Nation v. Hitchcock*, *supra*; *Taylor v. Tayrien*, 51 F.2d 884 (10th Cir. 1931), *cert. denied*, 284 U.S. 672 (1931).

²⁴25 U.S.C. §§ 396a-396g (1976).

dian Mineral Leasing Act and has promulgated regulations governing virtually every aspect of the operation of such leases.²⁵

It is clear that the imposition of the possessory interest tax and the business activity tax by the Navajo tribal council will have a direct impact upon not only the energy companies and non-Indian public, but upon the Tribe itself. Since the Secretary of the Interior has a duty to supervise and manage tribal assets, unilateral tribal action which will affect, and potentially inhibit development of these assets cannot be allowed.²⁶ If the Tribe increases the level of these taxes without participation by the federal government, it is clear that in the long term tribal resources may not be developed in the best interest of the tribe or the nation. Tribal actions which so clearly impact the development of tribal and national resources, therefore, cannot be implemented without the participation and concurrence of the Secretary of the Interior.

When the Secretary of the Interior has the duty to monitor and regulate Indian activities he cannot simply decide not to become involved.²⁷ He cannot, therefore, ful-

²⁵25 CFR § 211 and 30 CFR § 206; Interior Department Notices to Lessees, 1-7; Mineral Management Services Payor Handbook; United States Geological Service Conservation Manual, Part 647, Chapters 2 and 15.

²⁶*Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), cert. denied, 78 L.Ed.2d 723 (1983); *U.S. v. 9,345.53 acres*, 256 F. Supp. 603, 605 (W.D.N.Y. 1966). Cf. *Kennerly v. District Court*, 400 U.S. 423 (1971), (unilateral transfer of tribal jurisdiction ineffectual in the absence of federal authorization or participation).

²⁷*Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971); *United States v. Douglas*, 190 F. 482 (8th Cir. 1911); *United States v. Gray*, 201 F. 291 (8th Cir. 1912); *United States v. Sandstrom*, 22 F. Supp. 190 (N.D. Okla. 1938).

fill his statutory duty to supervise tribal resource development by merely delegating his authority to the Navajo tribal council, without any procedure for review by federal authorities.²⁸

C. The Secretary of the Interior has the legal authority to control development of tribal property and resources.

Over the years, Congress has delegated much of its authority to regulate and control Indian property, resources and activities to the Interior Department.²⁹ Congress has, for example, required the Secretary of the Interior to approve both land sales and long-term leases by Indian tribes.³⁰ Secretarial approval is even required before a tribe may grant a right-of-way across its land.³¹ Secretarial approval is also required for the sale or lease of natural resources produced on tribal lands.³² The Secretary is also required to approve contracts obligating tribal funds.³³

²⁸*Oglala Sioux Tribe v. Hallett*, 708 F.2d 326 (8th Cir. 1983); *New York Indians v. United States*, 40 Ct. Cl. 448 (1905); *United States v. Camp*, 169 F. Supp. 568 (E.D. Wash. 1959).

²⁹See, e.g., Act of July 27, 1868, Ch. 259, 15 Stat. 228; Act of Aug. 15, 1876, Ch. 289, § 5, 19 Stat. 176, 200 (codified presently at 25 U.S.C. § 261); *United States v. John*, 437 U.S. 634 (1978); *Brader v. James*, 246 U.S. 88 (1918); *Secretary's Power to Regulate Conduct of Indians*, 1 Int.Op.Sol. 531 (1935). In *Moapa Band of Paiute Indians v. U.S. Dept. of Int.*, No. 84-1593 (9th Cir.), the Interior Department refused to approve a tribal ordinance allowing the tribe to operate a brothel on the reservation.

³⁰25 U.S.C. § 177, 399, 397, 402(a), 415 (1976).

³¹25 U.S.C. § 311, 312, 319, 321, 323 (1976).

³²25 U.S.C. 396a, 397, 399, 406, 407 (1976).

³³25 U.S.C. § 81, 85, 121-125 (1976).

In addition to delegations of authority to control specific matters, the Secretary has broad authority under 25 U.S.C. §§ 2 and 9 to govern Indian affairs in general.³⁴ In *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1007 (1967); *reh. denied* 386 U.S. 939 (1967), the Court relied in part on 25 U.S.C. § 2, which it found "delegates to the Secretary the supervision of the affairs and public businesses of the Indian tribes." 366 F.2d at 672. Speaking for a unanimous Court, Judge, now Chief Justice, Burger, defined the power of the Secretary over Indian business and contractual relationships in the following terms:

"In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively. Courts have taken this approach with respect to various aspects of Indian life, recognizing that '[t]his statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States.'" 366 F.2d at 673.

In its treatise, *Federal Indian Law* (U.S.G.P.O. 1958), the Interior Department itself reviewed its broad statutory authority under 25 U.S.C. §§ 2 and 9 and concluded:

³⁴*United States v. Birdsall*, 233 U.S. 223 (1914); *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *Armstrong v. United States*, 306 F.2d 520 (10th Cir. 1962); *United States v. Barnsdall Oil Co.*, 127 F.2d 1019 (10th Cir. 1942); *United States v. Stanolin Crude Oil Purchasing Co.*, 113 F.2d 194 (10th Cir. 1940); *Rainbow v. Young*, 161 F. 835 (8th Cir. 1908); *United States v. Clapox*, 35 F. 575 (D. Or. 1888); *People v. McCovey*, 205 Cal. Rptr. 643, 685 P.2d 687 (1984).

"Federal administrative power over Indian affairs, vested in the Secretary of the Interior, is virtually all-inclusive." (Pp. 51-52.)³⁵

It is clear then, the Secretary of the Interior has the legal authority to review the proposed Navajo taxes. He also has a duty to do so.

II.

The Secretary of the Interior has a duty to protect the Constitutional rights of non-Indians doing business on the reservation under federal authority.

Even if the Secretary of the Interior did not have a duty to supervise and control the development of tribal property and resources, he would be obligated to review the Navajo possessory interest and business activity taxes before they could be imposed on non-Indian federal lessees.

Indian tribes are not constrained by the United States Constitution in the same fashion or to the same extent as the federal and state governments.³⁶ The Secretary of the Interior is, of course, bound to uphold the Constitutional rights of all Americans.³⁷ While Indian tribes, then, may

³⁵The Deputy Solicitor of the Interior Department specifically represented to this Court that 25 U.S.C. §§ 2 and 9 provide a basis for Interior to "disapprove and certainly to refuse to implement any ordinance enacted by a tribe which bears on others than members, and which has not been approved and would affirmatively disapprove . . ." (Oral Argument in *Merrion v. Jicarilla Apache Tribe*, No. 80-11, Nov. 4, 1984, Tr. p. 43 [455 U.S. 130 (1982)]). For an excellent review of the Interior Department's recent interpretation of its broad statutory mandate to govern all aspects of Indian affairs, see *Treaty Status of the Muckleshoot Indian Tribe*, 80 I.D. 222, 225-227 (1972).

³⁶*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896); *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 154).

³⁷*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ballinger v. United States, ex rel. Frost*, 216 U.S. 240 (1910).

arguably be able to govern non-Indians absent the limitations on governmental power delineated in the Constitution, that venerable document does not contemplate enclaves where the Constitutional rights of Americans may be suspended.³⁸ As the Court recognized in *Merrion*, it is important that the Interior Department be involved in the review and administration of Indian tribal taxes over non-Indians. Based on their ethnicity, non-Indians do not have the right to vote in tribal elections or participate in tribal government in any fashion. Taxation against a non-resident is always dangerous³⁹ but it is particularly dangerous in this situation, where the non-Indians have no means of acquiring "residency" or the right to participate in tribal government.⁴⁰ It is, therefore, imperative that the Interior Department intervene to insure that any taxes imposed by the tribal council are not arbitrary and comply with both the national and tribal interest.

³⁸*Southern R. Co. v. Greene*, 216 U.S. 400, 412 (1910); 258 U.S. 298, 309 (1922); *Healy v. James*, 408 U.S. 169, 180 (1972). Tribal customs are clearly not an appropriate basis on which to allow non-Indians to be governed in contravention of their Constitutional rights, by Indian tribes. *In re Sah Quah*, 31 F. 327 (D. Alas. 1886).

³⁹As Justice Jackson said in *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947) (dissenting):

"But here the ultimate burden of the tax falls on consumers of New York and elsewhere who have no representation in the government which lays the tax and fixes its amount. The authorities who have fixed the tax will never have to answer to those who pay it. That is the evil of 'taxation without representation' . . . it is a tax that falls ultimately on non-residents of the taxing authority. If it is valid, I know of no reason why the community should bear any of its own tax burdens." 331 U.S. at 94-95.

⁴⁰"In this nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 440 U.S. 410, 426 reh. denied 441 U.S. 917 (1979).

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court specifically found that Secretarial approval of tribal taxation imposed on non-Indians was necessary, in part to prevent the unfair or arbitrary use of tribal authority. Although this Court approved the severance tax of the Jicarilla Apache Tribe in *Merrion*, it pointed out repeatedly that since the Jicarillas had accepted the Indian Reorganization Act, 25 U.S.C. § 476,⁴¹ both their Constitution and the tribal tax at issue had been specifically reviewed and approved by the Interior Department. More importantly, this Court emphasized the necessity of Secretarial approval as a safeguard for the constitutional rights of non-Indians subjected to tribal authority. Speaking for the majority, Justice Marshall pointed out that under the Indian Reorganization Act, "Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." 455 U.S. at 155. After noting the limitations inherent in tribal sovereignty (see Point III, *infra*), Justice Marshall made the following relevant observations:

"Of course, the tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the tribe must obtain the approval of the Secretary before any tax on non-members can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and insure that any exercise of the tribal

⁴¹For a detailed discussion of the failure of the Navajo tribe to accept the Congressional authorization for tribal governmental authority contained in the Indian Reorganization Act, see the brief of the petitioner, Kerr-McGee, pp. 27-30.

power to tax will be consistent with national policies." 455 U.S. at 141.⁴²

It is particularly important that the Secretary review and participate in the administration of the Navajo taxes at issue, since they contain several features which have the potential to be exercised "in an unfair or unprincipled manner", "[in]consistent with national policies." The Navajo taxes, for example, have substantial potential to deprive petitioners of their right to a hearing before an impartial tribunal and thus, of due process of law.

The Navajo tribal taxes provide that the courts of the Navajo tribe are vested with exclusive jurisdiction over any and all persons subject to the tax. §§ 219, 425. Both taxes contain provisions specifically prohibiting any suit to restrain the assessment or collection of the taxes "in any court by any person" and for penalties for taxpayers who "evade or defeat the tax." §§ 217, 222, 426.

Unlike the Jicarilla tax approved in *Merrion* which specifically provided for review in federal court, neither of the Navajo taxes allow for any review of non-Indians' constitutional claims by a court sanctioned under Article III of the United States Constitution.⁴³ Texaco submits

⁴²Although the Navajos have previously argued the Court did not rely on Secretarial approval of the tribal tax in *Merrion*, their argument is not consistent with the language of the opinion, (see, e.g., 455 U.S. 151, n. 16) or its subsequent interpretations by legal commentators. Note *Indian Taxation of Non-Indians*, 50 Tenn.L.R. 403 (1983); Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U.Pa.L.R. 195, 234, n. 216 (1984).

⁴³It is especially important that the non-Indian petitioners herein have access to an Article III court, since the Navajo tribal courts are obligated to resolve disputes under the "Customs and

(Continued on next page)

that it is not appropriate to subject non-Indians to judgment "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).⁴⁴ The Secretary, therefore, has an obligation to make sure non-Indians doing business on Indian reservations have access to a fair hearing before an impartial tribunal with review by a court sanctioned under Article III.⁴⁵ This is especially true here, since the Secretary of the Interior had expressly rejected separate Navajo courts not subject to Interior Department review at the time several of these mineral leases were executed.⁴⁶

The provisions of the Navajo taxes which provide for final review by the Navajo supreme judicial council are

(Continued from previous page)

Usages" of the Navajo tribe. N.T.C., T 7, § 204. Indeed, the Navajo Supreme Judicial Council has a panel "composed of persons learned in Navajo law, custom, tradition and culture, including medicine men, retired judges, chapter officers, anthropologists, advocates, professors and other professionals" to sit on each case and advise it. N.T.C., T 7, § 326.

⁴⁴*Compare United States v. Wheeler*, 435 U.S. 313, 331-2 (1978) (recognizing such informal tribal custom is appropriate to judge tribal members) with *Oliphant v. Suquamish Indian tribe, supra* (1978) (rejecting Indian criminal jurisdiction over non-members).

⁴⁵The "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). For that reason, the Constitution mandates that any challenge to the deprivation of a constitutionally guaranteed right be reviewable in an Article III Court. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977); *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968).

⁴⁶See preamble to CO-69-58 History, N.T.C. Title 7 § 201.

also troubling since the Navajo tribal council which adopted these taxes becomes the final arbiter of their legality and applicability.⁴⁷ The Navajo supreme judicial council consists of eight members, five of whom are members of the current tribal council, with provision for the appointment of two former members of the tribal council. N.T.C. Title 7, § 322. All members of the supreme judicial council are appointed by the chairman of the tribal council. *Id.* When a legislative body such as the Navajo tribal council initiates governmental action and then acts as the final arbitrator thereof, the guarantee of due process of law is in danger.⁴⁸

The Secretary's role as an arbiter of disputes between Indian and non-Indians, then, is particularly critical in the present situation. In *Oliphant v. Suquamish Indian Tribe*, *supra*, this Court found that whatever original judicial authority Indian tribes had over non-Indians operating on the reservation had been relinquished to the federal government. Speaking for the Court, Justice Rehnquist said:

"But from the formation of the Union and the adoption of the Bill of Rights, the United States has now vested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an im-

⁴⁷After the Navajo court of appeals declared several tribal council resolutions invalid, the tribal council passed a resolution creating the Navajo "Supreme Judicial Council" to have final authority over all judicial proceedings. N.T.C. Title 7, § 321.

⁴⁸The danger for abuse when the legislature reviews and passes upon the legality of its own pronouncements led to the prohibition of Bills of Attainder in our Constitution. *United States v. Brown*, 381 U.S. 437 (1965); *People v. Budd*, 117 N.Y. 1, 22 N.E. 670 (1889), *aff'd* 143 U.S. 517 (1892).

portant manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States, except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a want of fixed laws [and] of competent tribunals of justice. H.R. Regs. No. 474, 23d Cong., 1st Sess. 18 (1834). It should be no less obvious today, even though present day Indian tribal courts embody dramatic advances over their historical antecedents. . . . These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondent's contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure." 435 U.S. at 210-211.

The enforcement provisions of the Navajo taxes could subject the non-Indian federal lessees to seizure of all their reservation property, permanent suspension of the right to do business "within the Navajo Nation" and thousands of dollars in penalties.⁴⁹ These sanctions are essentially punitive and quasi-criminal in character.⁵⁰ The Secretary, therefore, must uphold the federal interest in protecting these non-Indian federal lessees against the

⁴⁹That the lessees legitimately fear such sanctions is evidenced by *Tenneco Oil Company v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984), wherein the Tribe notified the lessee that "a petition for cancellation of Tenneco's lease had been submitted to the tribe's business committee based on Tenneco's failure to comply with the newly enacted tribal tax."

⁵⁰*United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

quasi-criminal sanctions which may be unilaterally imposed by the tribe under the Navajo taxes.⁵¹

III.

Tribal taxation of federal leasees without secretarial approval is inconsistent with the status of Indian tribes as domestic dependent sovereigns.

Indian tribes have never been recognized as having the right to exercise coercive governmental power over non-Indians. *Oliphant v. Suquamish Indian Tribe*, *supra*. "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544 (1981) *reh. denied*, 452 U.S. 911 (1981). The Navajo tribe, therefore, does not have the "inherent sovereign power" to impose these taxes without participation by the federal government.

As early as 1810 this Court recognized the limitations of tribal authority over non-Indians.⁵² The limited nature of tribal sovereignty was first analyzed at length by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where he described Indian tribes as "domestic dependent nations". In a concurring opinion, Justice Johnson made it clear that Indian tribes were not to be equated with the federal or state governments in

⁵¹In the absence of direct federal involvement, such quasi-criminal sanctions as seizure of a non-Indian's property have historically been found to be outside the realm of tribal powers, in the absence of direct federal involvement. *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976); *Settler v. Yakima Tribal Court*, 419 F.2d 486, 489 (9th Cir. 1969) *cert. denied* 398 U.S. 903 (1970); *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

⁵²*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

terms of their governmental authority, especially over non-Indians. 30 U.S. (5 Pet.) at 26. *See also* the concurrence of Justice Baldwin. 30 U.S. (5 Pet.) at 48-49.⁵³

In *United States v. Kagama*, 118 U.S. 375 (1886), the Court interpreted an Act of Congress⁵⁴ prohibiting further treaties with Indian Tribes, as a recognition the Tribes did not possess sovereignty in the sense of independent governmental power, but were completely "dependent for their political rights" on the government of the United States. 118 U.S. at 384.

This Court's more recent decisions have likewise recognized that Indian tribes are proscribed from exercising those governmental powers terminated by Congress,⁵⁵ as well as those inconsistent with their dependent status.⁵⁶ In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court recognized that Indian tribes do not possess governmental sovereignty in the same sense, or from the same source, as the United States government. In describing the areas of "sovereignty" necessarily withdrawn as a result of the dependent status of Indian tribes, Justice Stewart, speaking for a unanimous Court, said:

⁵³Other early decisions likewise recognized the limitations inherent in the fact tribal sovereignty is "dependent". *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *United States v. Rodgers*, 45 U.S. (4 How.) 567 (1846); *United States v. McBratney*, 104 U.S. (14 Ott) 621 (1881); *Choctaw Nation v. United States*. 119 U.S. 1, 27 (1886).

⁵⁴This statute, the Act of March 3, 1871, Ch. 120 § 3, 16 Stat. 570 is presently codified as 25 U.S.C. § 71.

⁵⁵*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *United States v. Quiver*, 241 U.S. 602 (1916).

⁵⁶*Kennerly v. District Court*, 400 U.S. 423 (1971); *People v. Martin*, 326 U.S. 496 (1946).

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of a tribe. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. 435 U.S. at 326.

In light of this "implicit divestiture of sovereignty" over non-members of the tribe, tribal governmental action must be implemented by federal authority to be effective against non-Indians.⁵⁷ The Interior Solicitor has repeatedly held "That the taxing power of Indian tribes does not extend to the levy by a tribe of a tax upon licensed traders, in the absence of an authorization from the Commissioner of Indian Affairs." *Regulation of Traders on the Navajo Reservation*, 60 I.D. 176, 178 (1948). See also *Powers of Indian Tribes*, 55 I.D. 14, 48 (1934). Such opinions are consistent with other decisions by legal officers of the executive branch⁵⁸ as well as those of the lower courts.⁵⁹ This Court has also long recognized that in the absence

⁵⁷*United States v. Mazurie*, 419 U.S. 544, 547-8, 554 (1975); Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L.J. 89, 135-6 (1978); Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 Iowa L.R. 1459, 1464 (1979); Oliver, *The Legal Status of American Indian Tribes*, 38 Or.L.R. 193, 230-4 (1959). Cf. 18 USC § 1165 (federal criminal penalties authorized to enforce tribal hunting and fishing ordinances).

⁵⁸See e.g., *Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645 (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs*, p. 2, June 3, 1941.

⁵⁹*Muskogee National Telephone Co. v. Hall*, 118 Fd. 382 (8th Cir. 1902); *City of Tulsa v. Southwestern Bell Telephone*, 5 F. Supp. 822 (N.D. Okla. 1934), *aff'd* 75 F.2d 343 (10th Cir. 1935), *cert. denied* 295 U.S. 744 (1935).

of federal approval and implementation, tribal action cannot lawfully interfere with property rights sanctioned by the federal government.⁶⁰ Indeed, in every case where tribal taxation has been approved by the judiciary, it has been expressly sanctioned and/or implemented by the executive branch of the federal government.⁶¹

While Indian tribes retain the power to tax non-Indian lessees when such taxation is approved or implemented by the federal government,⁶² then it is clear tribal taxation of federal lessees without federal approval is "inconsistent with their diminished status as sovereigns." *Montana v. United States*, *supra*. For this reason Congress adopted a specific framework for federal supervision over, and participation in, such tribal resolutions. Under the Indian Re-

⁶⁰*Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890).

⁶¹*Merrion v. Jicarilla Apache Tribe*, *supra*; *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tribal tax approved by the President of the United States.) In both *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) and *Barta v. Oglala Sioux Tribe*, 146 F. Supp. 917 (D.S.D. 1956), *aff'd* 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959), the authority of the tribe to levy taxes was approved and implemented through the procedure specifically required under the Indian Reorganization Act, 25 U.S.C. § 476 (1976). In rejecting the contention that since tribal power was an "inherent attribute of sovereignty," the collection of the tribal tax did not raise a federal question, the *Barta* Court said:

"Thus the rights derived from original sovereignty have been directly channeled into a federal statutory scheme and all tribal powers are exercised under federal law. The plaintiff's tribal constitution was not adopted under rules established by tribal custom, but rather under authority granted by the Congress of the United States, namely, the Indian Reorganization Act." 146 F. Supp. at 918.

⁶²*Merrion v. Jicarilla Apache Tribe*, *supra*; *Crabtree v. Madden*, 54 F. 426 (8th Cir. 1893); *Iron Crow v. Oglala Sioux Tribe*, *supra*; *Barta v. Oglala Sioux Tribe*, *supra*.

organization Act, 25 U.S.C. § 476, Congress established "a series of federal checkpoints"⁶³ for implementation of such ordinances. Despite repeated invitations by Congress to participate under the Indian Reorganization Act, the Navajos have declined to do so.⁶⁴

The Navajos taxes at issue here are also beyond the authority of the Tribe because they purport to have extraterritorial effect. The Navajo Business Activity Tax is imposed upon receipts from any "Navajo branch" for "gross receipts of that branch from the sale, either within or without the Navajo nation . . ." § 403(2)

While the Navajo business activity tax does not contain a definition of "Navajo Nation," that phrase has been defined in other contexts to include tribal and allottee lands beyond the borders off the Navajo Reservation.⁶⁵ This Court has emphasized that there is a significant geographical component to tribal sovereignty,⁶⁶ which cannot be enlarged over non-Indians without express federal delegation.⁶⁷ The Navajos do not have the authority to

⁶³*Merrion v. Jicarilla Apache Tribe*, *supra*, 455 U.S. at 155.

⁶⁴Since the Navajo tribe refused to channel its "retained sovereignty" through the federally prescribed channels, it was necessary for the Interior Department to create a Navajo tribal government out of whole cloth. *Navajo-Hopi Rehabilitation Act, Proposed Constitution for Navajo Tribe*, 11 Int.Sol.Op. 1641 (1954); Order 551, Fed.Reg. Oct. 30, 1958; Navajo Tribal Council Resolution, CJA-1-59.

⁶⁵See e.g. 18 U.S.C. § 1151 and N.T.C. Title 7 § 134, as discussed in *General Motors Acceptance Corp. v. Chischilly*, 96 N.M. 113, 628 P.2d 683 (1981).

⁶⁶*White Mountain Apache Tribe v. Bracker*, *supra*.

⁶⁷*Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9 (1973); *General Motors Acceptance Corp. v. Chischilly*, *supra*; Cohen, *Handbook of Indian Law*, 148 fn. 236 (U.N.M. ed. 1971); *Indian Police*, 18 Op.Atty.Gen. 440 (1886).

exercise unilateral jurisdiction over property which is not owned by the tribe since it "bears no clear relationship to tribal self-government". *Montana v. United States*, *supra* at 564. The exercise of such extraterritorial jurisdiction would also raise due process questions.⁶⁸ That such extraterritorial taxing jurisdiction is beyond the scope of tribal sovereignty is emphasized by the fact the Secretary of the Interior has disapproved tribal taxation of resources in similar checkerboard situations.⁶⁹

CONCLUSION

For the reasons given above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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⁶⁸*Riverside and Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); *National Mutual Building & Loan Assoc. v. Brahan*, 193 U.S. 635 (1904). See also opinion of Marshall, J. (dissenting) in *Rosebud Sioux Tribe v. Kneip*, *supra*.

⁶⁹*Crow Tribe of Indians v. State of Montana*, 469 F. Supp. 154 at 156 (D. Mont. 1979). To the extent the Navajo taxes apply to tribal fee or trust land the Secretary has recognized he may approve only such regulations "as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property." 25 C.F.R. § 1.4(b); *United States v. County of Humboldt*, 3 Ind.L.Rptr. 6482 (N.D. Cal. 1976).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

KERR-McGEE CORPORATION, PETITIONER

v.

NAVAJO TRIBE OF INDIANS, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

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QUESTION PRESENTED

Whether an Indian Tribe that has no written constitution and is not subject to the Indian Reorganization Act of 1934 may tax nonmembers engaged in business activities on the Reservation without first obtaining the approval of the Secretary of the Interior.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-68

KERR-MCGEE CORPORATION, PETITIONER

v.

NAVAJO TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

INTEREST OF THE UNITED STATES

It is superfluous, at this day, to recapitulate the history underlying the unique relationship between the government of the United States and the surviving Indian Tribes. The enduring reality, as this Court has repeatedly stressed, is that tribal Indians are the "wards of the Nation." *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Kagama*, 118 U.S. 375, 383-384 (1886); *Morton v. Mancari*, 417 U.S. 535, 551-553 (1974). In consequence, the United States enjoys unusual powers over Indian affairs, and, correspondingly, owes the Tribes a special duty of protection. *Ibid.* And, equally important, where Congress has not intervened, that obligation calls for vindication of tribal autonomy and respect for the Tribe's governmental institu-

(1)

tions. *E.g.*, *Worcester v. Georgia*, 31 (6 Pet.) 515 (1832); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *New Mexico v. Mescalero Apache Tribe*, No. 82-331 (June 13, 1983). Indeed, in recent years, this aspect of the relationship has been emphasized in congressional commitments to encourage tribal self-government and self-sufficiency—commitments which are, of course, binding on the Executive Branch.

The upshot is that the United States has an obvious interest in the question presented here. We cannot be indifferent to the issue whether tribal taxation bearing against nonmembers doing business on an Indian Reservation does or does not require the approval of federal officers. Not only will the answer immediately affect the future practice of the Department of the Interior, but the ruling will either endorse or fault the Government's longstanding view of its statutory discretion in the premises. For these reasons, the United States has participated below in this case and in similar litigation in the Tenth Circuit. We deem it appropriate also to submit a brief here, now that this Court has determined to review the question.

STATEMENT

1. In 1978, the Navajo Tribal Council, the governing body of the Navajo Tribe of Indians, enacted two ordinances imposing taxes known as the Possessory Interest Tax and the Business Activity Tax (J.A. 38-64). The Possessory Interest Tax is measured by the value of leasehold interests in tribal lands; the rate of taxation has remained at 3% of the value of those interests (J.A. 41-43). The Business Activity Tax is assessed on receipts from the sale of personal property produced or extracted within the Navajo Nation, or from the sale of

services within the Reservation (J.A. 52-56).¹ The tax basis is calculated by allowing a standard deduction and subtracting specified expenses (J.A. 55-56).

The two taxes are applicable to both Navajo-owned enterprises and non-Indian businesses (J.A. 41, 52-55). Taxpayers dissatisfied with the assessment enjoy the right of appeal to the Navajo Tax Commission and the Navajo Court of Appeals (J.A. 44-45, 60-61).

After the enactment of the ordinances, the Navajo Tribe submitted them to the Bureau of Indian Affairs of the United States Department of the Interior for an opinion as to whether they required federal approval. The Bureau responded that neither tax was subject to approval or disapproval by the Department of the Interior (J.A. 65-66, 68-71).

2. Before any tax payments were made, petitioner, a substantial mineral lessee on the Navajo Reservation, brought this action in the United States District Court for the District of New Mexico seeking to invalidate the ordinances (J.A. 4-37). The present proceedings result from the transfer to the District Court for Arizona of that portion of the complaint that related to petitioner's mineral operations in that State (Pet. App. B2). Meanwhile, a similar suit was instituted by other companies in the District Court for Utah. One claim in each case was that the taxes were invalid without approval by the Secretary of the Interior (J.A. 32-33). In 1982, the district court in Utah sustained such a challenge. *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140. The district court in the case at bar then reached the same conclusion, holding that the Tribe was collaterally estopped by the decision in *Southland Royalty* (Pet. App. B4-B9), and that, in any event, Secretarial approval was a prerequisite to the effectiveness of the tax ordinances (Pet. App. B9-B14).

¹ If the property is produced on the Reservation but removed before sale, it is valued as of the time of the property leaves the jurisdiction (J.A. 53).

The Tribe appealed that judgment to the Court of Appeals for the Ninth Circuit. In the meantime, the Tenth Circuit reversed in *Southland Royalty*, holding that no approval by the Secretary was required. 715 F.2d 486 (1983), petition for rehearing pending. Then, on April 17, 1984, the Ninth Circuit issued its decision in this case, agreeing with the Tenth Circuit on the issue of Secretarial approval (Pet. App. A11-A12).

INTRODUCTION AND SUMMARY OF ARGUMENT

For well over a century, Indian Tribes have been taxing nonmembers doing business on the Reservation with the full acquiescence of all three Branches of the federal Government. It has always been understood, moreover, that this represents an aspect of continuing tribal sovereignty, not a new prerogative conferred by the United States. Accordingly, the only question is whether Congress has taken away the pre-existing power or has conditioned its exercise. This Court only recently has confirmed that tribal taxing authority over nonmembers engaged in on-Reservation business activities generally has survived. In the present case, it is nevertheless argued that, by virtue of the Indian Reorganization Act of 1934 or the Indian Mineral Leasing Act of 1938, this is no longer true with respect to taxation of mineral lessees by Tribes that rejected the benefits of the 1934 Act. We briefly address this extravagant claim, but primarily discuss the alternative contention that, for all Indian Tribes, tax ordinances bearing on nonmembers are effective, as a matter of federal law, only if and when approved by the Secretary of the Interior.

In our submission, the court of appeals here, like the Tenth Circuit in the *Southland Realty* case, correctly rejected the argument. It is true that, for some years, it was common practice to submit taxing measures to Interior Department review, albeit it does not appear that any such ordinance has been disapproved as unwarranted or excessive—in all the years between *Morris*

v. *Hitchcock*, 194 U.S. 384 (1904), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). See also, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959); F. Cohen, *Handbook of Federal Indian Law* 131 & n.74 (1942). But the significant point is that no federal law so required—except for the special case of the Five Civilized Tribes in Oklahoma, all of whose legislation had to be submitted to Presidential veto during the eight years before their governments were effectively abolished in 1906. Secretarial review of tax ordinances reaching nonmembers—and often much else—was a consequence of tribal constitutional provisions through which the Tribe bound itself to submit its action to federal administrative approval. Whether such “delegations” were wholly voluntary, or prompted, or even exacted, by the Bureau of Indian Affairs is immaterial. The fact is that Congress never mandated the screening procedure.

Indeed, one searches the statute book in vain for any hint, much less the “clear indication” required, that Congress intended to subject the taxing power of Indian Tribes to Executive Department veto. As we show in the pages that follow, nothing in the Indian Trader statutes, the Indian Reorganization Act or the Indian Mineral Leasing Act can be read to impose such a condition on the exercise of this fundamental governmental power. And as this Court has noted, more recent congressional enactments reflect a commitment to encouraging greater, not less, tribal self-government, and promoting self-sufficiency. It is therefore not surprising that the Department of the Interior has at all periods deemed itself free to make exceptions, approving tribal constitutions that do not require prior administrative approval of tax measures, and that, in light of the relative success of “reorganization,” the Department today encourages the

elimination of the traditional Secretarial review clauses in tribal constitutions. It follows, of course, that the Navajo, who have never adopted a written constitution, are free to enact tax ordinances like those in suit without obtaining prior approval from the Secretary.

The result is in no way anomalous or unjust. Congress has required approval by the Secretary of the Interior before a Tribe can alienate or encumber its land or enter into specified contracts. And, by statute, traders must obtain federal permission before selling goods in Indian country. But these laws are designed to protect the Indians against imposition by unscrupulous outsiders. Obviously enough, the same risks are not implicated by tribal taxation of nonmembers and it is therefore not surprising that no comparable statutory condition has been enacted in the present context. Nor would a Secretarial veto be an appropriate means of affording the taxpayers a voice in the matter. The Secretary of the Interior properly may act as guardian of Indian Tribes to shield them from potential improvidence, but he does not "represent" the adverse interest of non-Indian mineral lessees. They have entered the Reservation with a view to commercial profit and there is nothing unfair in their being required to submit to taxation by the local government that provides substantial services.

ARGUMENT

It is now firmly settled that, except as Congress may have limited or conditioned its exercise, Indian Tribes today retain, as a residual aspect of aboriginal sovereignty, the inherent power to tax non-Indians who conduct business within the Reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-148 (1982). See, also, *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980). Accordingly, unless some provision of federal or tribal

law otherwise provides, it can make no difference in the case of any Tribe whether its general taxing authority or the particular tax has been approved by the federal Government: retained inherent powers, not derived from the United States, do not, in principle, require further "authorization" from the national sovereign before they are exercised.

The only question, then, is whether, although permitting tribal taxing power over nonmembers to continue, Congress has decided to condition it by imposing "constraints" on its exercise or erecting "checkpoints that must be cleared before a tribal tax can take effect." *Merrion*, 455 U.S. at 141, 155. The Court, it is true, has used these words in the context of a tax ordinance enacted by a Tribe organized under the Indian Reorganization Act of 1934 (I.R.A.) which had adopted a constitution requiring the Secretary of the Interior's approval of taxes on nonmembers. *Ibid.* And it is now suggested that, at least in respect of taxes bearing on mineral lessees, Secretarial approval is equally required in the case of Tribes, like the Navajo, who rejected the I.R.A. and are not bound by any tribal constitutional provision to obtain the Secretary's permission. There is, indeed, a more extreme submission to the effect that Congress has wholly deprived "nonconforming" Tribes, not reorganized under the I.R.A., of any such taxing authority. We address these novel arguments by revisiting the federal legislation which might have conditioned the exercise of the power to tax on Secretarial approval—but did not do so.

1. At the outset, it is well to remind ourselves that, in relatively recent times, Indian Tribes taxed non-Indians doing business in the Indian country without seeking or obtaining any approval from federal officials. A sufficient example, twice pointedly cited by this Court as a persuasive precedent, is an 1876 law of the Chickasaw Nation imposing an occupational license tax on non-Indians engaged as laborers, merchants, traders or physi-

cians within the Chickasaw territory. See *Morris v. Hitchcock*, 194 U.S. 384, 389-390 (1904); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 139-140. That statute was duly enacted under the Chickasaw Constitution of 1867, which established a formal governmental structure with three branches, including a bicameral legislature and a Governor, and required no submission of any legislation to federal officials. 9 *The Constitutions and Laws of the American Indian* 1-19 (1975).² The local Indian Agent criticized the tax (see Annual Report of the Commissioner of Indian Affairs for the Year 1877, at 110) and later apparently sought to annul it. See A. Debo, *The Rise and Fall of the Choctaw Republic* 140 (1934). The Secretary of the Interior vacillated, but, by 1881, he had firmly upheld the validity of such permit laws, notwithstanding they were enacted without prior authorization from the United States or subsequent ratification by its officers. See *id.* at 140-142; Annual Report of the Commissioner of Indian Affairs for the Year 1881, at 104.

What is more, the contemporary Congress specifically considered and acquiesced in this exercise of tribal power. See S. Rep. 698, 45th Cong., 3d Sess. 1-3 (1879),³ par-

² On its face, the 1867 Constitution indicates that it was itself adopted and promulgated without soliciting or obtaining federal approval. That had been the pattern for the earlier constitutions of the Chickasaws. See G. Foreman, *The Five Civilized Tribes* 121-122, 131 (1934); A. Debo, *A History of the Indians of the United States* 151, 169-173 (1970).

³ Petitioner appears to suggest that this Senate Report acknowledges tribal taxing power only when exercised "subject to the supervisory control of the Federal Government" (Pet. Br. 22-23). To be sure, the Senate Report (at 1 (emphasis added)) asserts federal power, implemented "by treaty or act of Congress," to "restrain[] and abridge[]" the tribal "right of self-government and jurisdiction over the persons and property within the limits of the territory [the Indians] occupy." But there is no claim that tribal enactments not inconsistent with federal law must win the approval of Executive Branch officials before becoming effective.

tially quoted in *Morris*, 194 U.S. at 389-390, and *Merrion*, 455 U.S. at 140. See also 7 Cong. Rec. 2911 (1878); 8 Cong. Rec. 929 (1879). Shortly thereafter, three Attorneys General gave formal opinions sustaining this and like permit taxes. 17 Op. Att'y Gen. 134, 135 (1881); 18 Op. Att'y Gen. 34, 35 (1884); 23 Op. Att'y Gen. 214, 216, 217 (1900).⁴ And, finally, the tribal tax laws were upheld in judicial decisions that this Court has cited with approval. *Maxey v. Wright*, 54 S.W. 807, 809-810, 812 (C.A. Ind. Terr.), *aff'd*, 105 F. 1003 (8th Cir. 1900);⁵ *Crabtree v. Madden*, 54 F. 426, 429 (8th Cir. 1893). See *Merrion*, 455 U.S. at 140, 141. One might have hoped that this resolution of the question, after full considera-

On the contrary, the Committee reproduced the full text of the Chickasaw law (Senate Report 3-4) and declared it "not invalid" (*id.* at 3), notwithstanding it obviously had not been approved by any federal official.

⁴ The Chickasaw enactment of 1876 is far from unique. Several dozen comparable tribal tax laws, all equally effective without federal approval, are to be found even in the very incomplete reprint of the laws of the Oklahoma Tribes entitled *The Constitutions and Laws of the American Indian*, *supra*. Among them are 1839 Choctaw enactments taxing all merchants (13 *id.* at 32), and traders (13 *id.* at 36); Muskogee (or Creek) laws of 1880 and 1881 taxing noncitizen traders (27 *id.* at 60-61), lawyers (28 *id.* at 83-84), residents (28 *id.* at 95), and miscellaneous occupations from hotelkeeping to selling shoes (28 *id.* at 106); an Osage law in force in 1882 taxing noncitizen cattle drovers (31 *id.* at 25); an 1885 law of the Sac and Fox taxing noncitizen lawyers (31 *id.* at 22); and a Chickasaw law of 1887 taxing mechanics (10 *id.* at 202).

⁵ Petitioner misleads when it asserts that "each of the three early cases pre-dating the IRA upon which the *Merrion* Court relied" involved "[f]ederal supervision and approval of tribal taxes" (Pet. Br. 19-20). The appellate court opinion in *Maxey v. Wright* did refer to the "superintending control of the interior department over the Creeks" (*id.* at 20), but this was said in support of the Department's authority to implement the tribal tax law by collecting it from the recalcitrant non-Indian. See 54 S.W. at 810. It is nowhere suggested that the tax law had been, or was required to be, approved by any federal official. And, indeed, it seems clear that the enactment never was submitted for review.

tion by all three branches of Government, would make it unnecessary to retrace the same ground a century later.

To be sure, in the special case of the Five Civilized Tribes, whose governments were reported to have become "wholly corrupt, irresponsible, and unworthy to be longer trusted" (see *Stephens v. Cherokee Nation*, 174 U.S. 445, 453 (1899)), Congress later subjected tribal legislation, including tax measures, to "a veto power in the President." *Morris v. Hitchcock*, 194 U.S. at 393. See Act of June 7, 1897, ch. 3, § 1, 30 Stat. 84; Act of June 28, 1898, ch. 517, §§ 29, 30, 30 Stat. 512, 518; Act of Mar. 1, 1901, ch. 676, para. 42, 31 Stat. 872; Act of Mar. 3, 1901, ch. 832, § 1, 31 Stat. 1077; Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 148. But this was a temporary solution to a localized problem arising in the context of Tribes whose autonomy was to be entirely extinguished in a very few years.⁶ The federal "check," moreover, was not confined to "external" legislation affecting non-Indians: it applied across the board to all enactments of the Civilized Tribes.

It may well be that the fate of these large and once most independent "Nations" effectively discouraged lesser Tribes from attempting to assert taxing power over non-Indians during the "dark age" of the American Indian that followed the turn of the Century. Yet, obviously,

⁶ Tribal governments were to cease altogether not later than 1906. See Act of June 28, 1898, ch. 517, § 29, 30 Stat. 512; Act of Mar. 1, 1901, ch. 675, para. 58, 31 Stat. 858; Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 725. Although the plan for total abolition of tribal government was not fully carried out, the power of taxation was explicitly ended in 1906. Act of Apr. 26, 1906, ch. 1876, § 11, 34 Stat. 141. Even so, it is noteworthy that in their last years of limited self-government, the Civilized Tribes enacted and the President approved a number of tax laws affecting non-Indians. See 23 Op. Att'y Gen. 528 (1901); *Morris v. Hitchcock*, *supra*; *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). We do not, of course, intend any comment on the present status and powers of the Five Civilized Tribes as a result of more recent legislation.

sovereign prerogatives are not irrevocably lost merely because, for a time, they remain unexercised as a result of fear or apathy or corruption. See *Merrion*, 455 U.S. at 173-174 n.24 (Stevens, J., dissenting); cf. *United States v. John*, 437 U.S. 634, 652-653 (1978). What matters is whether Congress acted—beyond the confines of Oklahoma—to extinguish the inherent authority of Tribes to tax those who entered their domain or to condition its exercise on federal approval. This Court has already dismissed the suggestion that a statute enacted in 1927 inhibits tribal taxing power in the mineral leasing context, and has also rejected at least one like argument under the Indian Mineral Leasing Act of 1938. *Merrion*, 455 U.S. at 150-151.⁷ As we now show, there is no other legislation even arguably sufficient to the purpose.

2. Ironically, the notion that prior permission from the Secretary of the Interior is required before an Indian Tribe may tax nonmembers is traceable to the early days of the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. 461 *et seq.*), a statute designed to restore a measure of political autonomy and economic self-sufficiency to the surviving Tribes. The requirement of Secretarial approval is not, however, a result fairly attributed to Congress, which never mandated any such condition, even for Tribes that accepted the I.R.A. Rather, the practice represents a discretionary decision of the Bureau of Indian Affairs, which wrote Secretarial review

⁷ We refer specifically to the Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. 398a *et seq.*; and the Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.* But the same reasoning equally applies to earlier legislation permitting States to tax the extraction of Indian Reservation minerals, without any mention of tribal taxing power, notably: the Act of June 30, 1919, ch. 4, § 26, 41 Stat. 31, 25 U.S.C. 399 ("solid" minerals); the Act of Mar. 3, 1921, ch. 119, § 26, 41 Stat. 1248 (Quapaw Reservation); the Act of Mar. 3, 1921, ch. 120, § 5, 41 Stat. 1250 (Osage Reservation); and the Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398 (treaty Reservations).

provisions into many tribal constitutions without any direction from Congress.

As the Court has noted (*Merrion*, 455 U.S. at 155), the I.R.A. provides that covered Tribes must obtain the Secretary's approval for any new or amended constitution adopted pursuant to the Act. 25 U.S.C. 476. And it is undeniable that in 1935, 1936 and 1937 the typical tribal constitution—often written by the B.I.A.—required Secretarial ratification of any tax measure affecting non-Indians. See F. Cohen, *Handbook of Federal Indian Law* 143 (1942); *Federal Indian Law* 408-413, 439 (U.S. Dep't of the Interior 1958); Strickland, Wilkinson, et al., *Felix S. Cohen's Handbook of Federal Indian Law* 149-150, 435-436 & n.48 (1982).⁸ But no law so ordained, and, in fact, the practice was not invariable.⁹ Indeed,

⁸ Although these are, in principle, three successive editions of the same book, they vary substantially on some issues. Hereinafter, the original Cohen volume is cited "Cohen, *Handbook*," the 1958 revision "*Federal Indian Law*," and the 1982 revision "*1982 Handbook*."

⁹ The clearest example of an exception is the 1937 Constitution of the Saginaw Chippewa Tribe, which authorized the tribal council, without Secretarial approval, to "create and maintain a tribal council fund by levying taxes or assessments against members or nonmembers for the use of property and facilities which belong to the organization." Art. VI, § 1(g), reprinted in 15 G. Fay, *Charters, Constitutions and By-Laws of the Indian Tribes of North America* 79, 82 (1967-1981).

In at least three other cases, tribal constitutions approved in 1937 made no express reference to nonmembers but authorized the enactment, without Secretarial review, of ordinances providing "for the levying of taxes and the appropriation of available tribal funds for public purposes of the * * * Tribe." Constitution of the Iowa Tribe in Nebraska and Kansas, Art. IV, § 1(f), in 14 Fay 29, 30; Constitution of the Kickapoo Tribe in Kansas, Art. V, § 1(f), in 14 Fay 15, 17; Constitution of the Sac and Fox Tribe of Missouri, Art. V, § 1(f), in 14 Fay 39, 41. See, also, the 1954 Amended Constitution of the San Carlos Apache Tribe (Art. V, § 1(k)) and the 1955 Amended Constitution of the Hualapai Tribe (Art. V, § 1(m)), both of which broadly empower the tribal council "to levy and collect taxes" without Secretarial approval, in 4 Fay

the contemporaneous formal published opinion of the Interior Department concerning the inherent powers of Indian Tribes did not say or imply that tribal tax ordinances reaching non-Indian activities, except for the special case of licensed traders, must be submitted for Secretarial approval. See *Powers of Indian Tribes*, 55 Interior Dec. 14, 46, 50 (1934), quoted in *Colville*, 447 U.S. at 152-153, and *Merrion*, 455 U.S. at 139.¹⁰

36, 37-38; *id.* at 89, 91; and the 1958 Amended Constitution of the Pueblo of Laguna (Art. IV, § 1(e)(4)), which requires no Secretarial review of ordinances "levy[ing] taxes," in 5 Fay 73, 77.

Finally, some constitutions, like the original 1937 Constitution of the Jicarilla Apache Tribe, simply made no specific reference to taxation at all. See *Merrion*, 455 U.S. at 134, 148-149 n.11. This does not affect the survival of the power of taxation, but its "effectuation" through an ordinance enacted by the tribal council might be inhibited because the council lacked delegated authority from the Tribe in the premises. *Merrion*, 455 U.S. at 148-149 n.11. In the particular case of the Jicarilla Apache, the situation was ambiguous: on the one hand the members had made an unrestricted grant of legislative power to the tribal council, subject only to "any limitations imposed by the Constitution and Statutes of the United States" (Art. VI, § 1); on the other hand, the only reference to enactments, vaguely defined as intending "to protect the peace, safety, morals and general welfare of the reservation," expressly provided for Secretarial review (Art. VI, § 4). In these circumstances, it may be doubted whether amendment of the constitution was strictly necessary to enable the council to enact a taxing ordinance with Secretarial approval—albeit the question is presumably one of tribal law. Cf. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 493 (1979).

¹⁰ It is worth noting, also, that Felix Cohen, then the prime authority on Indian law, never purported to justify such Secretarial approval clauses for tax ordinances on the ground that they were required by federal law. In his *Handbook*, first issued in 1942, he reproduces the typical taxation clause found in I.R.A. constitutions of that day without even commenting on the Secretarial review aspect of the provision. *Id.* at 143. Any reader familiar with Cohen's work will appreciate that this silence is not inadvertent: plainly, the author knew the preclearance requirement reflected a policy decision, not a legal requirement. See, also, *id.* at 130-133.

3. At all events, it is perfectly clear that the I.R.A. does not govern Tribes, like the Navajo, who declined to accept its provisions. 25 U.S.C. 478 and 478b. Although most Indian Tribes embraced the new law in 1934 and 1935, some 77 did not. See Haas, *Ten Years of Tribal Government Under the I.R.A.* 3, 13-20 (1947); 1982 *Handbook* 150 & n.48. Many of the "recalcitrant" Tribes already had constitutions or other organic laws. See Cohen, *Handbook* 128-129 & n.59. A number of other Tribes soon adopted constitutions, often obtaining the express approval of the Secretary of the Interior, albeit outside the I.R.A. See Getches, Rosenfelt & Wilkinson, *Cases and Materials on Federal Indian Law* 302, 306-307 (1979); Haas, *supra*, at 11-12. Most of those instruments required Secretarial approval of taxing ordinances bearing on nonmembers. *E.g.*, the Lummi and Colville Constitutions, noted in *Colville*, 447 U.S. at 143 n.11, 144. See, also, Getches, et al., *supra*, at 304. Others recited no such restriction. *E.g.*, the Constitution of the Agua Caliente Band of Mission Indians, which authorizes the tribal council, without secretarial review, "to promulgate and enforce assessments or permit fees upon nonmembers doing business and obtaining special privileges within [the] Reservation." Art. V, § 9, in 8 *Fay* 33, 36a. And several Tribes, the Navajo among them, have never had a written constitution, and therefore suffer under no "internal" impediment to the exercise of all subsisting sovereign powers.¹¹

¹¹ Presumably, the question of express delegation of tribal powers to a "legislative" council does not arise in the case of the Navajo. As the recently issued Bureau of Indian Affairs, U.S. Dep't of the Interior, *Guidelines: Review of Tribal Ordinances Imposing Taxes on Mineral Activities* § 1.6(B)(2)(a) (Jan. 18, 1983) make clear: "Unless their powers are specifically limited by the tribal documents which established them, the governing bodies of tribes without written constitutions will be considered to possess the authority to exercise the inherent power of the tribe to tax." (The *Guidelines* are reproduced as an appendix to the Brief for Respondents.) See pages 25-26, *infra*.

Thus, the situation of Tribes that rejected the I.R.A. varies according as they have, or have not, voluntarily bound themselves to submit their taxing ordinances to the Secretary of the Interior for review. But in no case is the result attributable to the Indian Reorganization Act. Even for Tribes that accepted "reorganization," the I.R.A. is in no degree the source of the power to tax nonmembers. Obviously, then, the statute did not abrogate or condition this pre-existing prerogative in respect of Tribes to whom the law explicitly does "not apply" (25 U.S.C. 478) because they rejected it. Nothing can change this reality, whatever exaggerated representations occasionally may have been made by zealous officials of the Bureau of Indian Affairs seeking to persuade various Tribes to accept the benefits of the I.R.A. See also page 25, *infra*.

4. Despite exceptions, the pattern just summarized may be taken to reveal a prevailing administrative view in the mid-1930s, and continuing for some time thereafter, to the effect that tribal taxation of non-Indians—like much else—generally ought to be supervised by the Bureau of Indian Affairs.¹² That, and no more, is what should be inferred from the practice of the Bureau of including a Secretarial review clause for any such taxing ordinance in most contemporary tribal constitutions, whether or not adopted under the I.R.A. This does not reflect any construction of recently enacted legislation. Whether or not it was then appropriate, or prudent, to insist on federal screening of tribal action that would affect non-Indians,¹³ the policy cannot be attributed to

¹² Another example is the common stipulation in I.R.A. constitutions that ordinances excluding nonmembers from the restricted lands of the Reservation must be submitted to the Secretary of the Interior for review. See Cohen, *Handbook* 143. Presumably, no one would argue that any Act of Congress requires prior federal approval for the exercise of tribal power to exclude. See *Merrion*, 455 U.S. at 173-186 (Stevens, J., dissenting).

¹³ It is fair to note that, in some instances, the Tribe, captive to the long habit of looking to the Indian Service for all decisions,

Congress and did not legally affect the prerogative of Indian Tribes other than those who, for the time being, "contracted away" their autonomy in the matter of taxation. It may seem odd that, in this respect, most of the Tribes that accepted the I.R.A. are, at least nominally, less independent. But that is only because they were more directly under the control of the Indian Bureau when their constitutions were written.¹⁴ And, in any case, the strings are now being cut.

Indeed, without any change in statutory law, the Department of the Interior, in recent years, has counseled against provisions requiring submission of taxing ordinances to the Secretary for review.¹⁵ And several

had to be restrained from delegating away too much, such as attempting to grant all taxing power to the Reservation Superintendent. See Cohen, *Handbook* 131 & n.74.

¹⁴ It is an all too familiar charge that, for many years, the I.R.A. "illustrates how a law intended to strengthen Indian governments and to give the people responsible business experience through making their own decisions * * * in fact actually increased federal control over them." W. Brophy & S. Aberle, *The Indian: America's Unfinished Business* 34 (1966). See, also, M. Price, *Law and the American Indian* 717-730 (1973); E. Cahn, *Our Brother's Keeper: The Indian in White America* 5-8, 10-13, 14-16, 112-139, 143-145 (1969). But see Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 Am. Anthropologist 279 (1984). That tendency, however, has now been reversed. See President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).

¹⁵ E.g., one Bureau of Indians Affairs position paper entitled *Drafting and Reviewing Proposed Tribal Constitutions and Amendments*, Jan. 1981, at 5 recites:

In only a few cases does a Federal Statute require that tribal enactments be subject to approval by the Secretary of the Interior. The approval of attorney contracts is an example. In those instances, Bureau policy is to include mention of that requirement in the powers article as long as this is required by Federal Law. Because of the turnover of persons both in the Bureau and the tribe, it is useful to have such language to avoid failure to comply with the law.

tribal constitutions have now been amended with Interior Department concurrence so as to remove the requirement of submitting such ordinances to Secretarial approval.¹⁶ This does not necessarily represent a shift of policy. It may be no more than a recognition of the relative success of the effort, initiated in 1934, to promote responsible tribal self-government, so that, today, Indian Tribes are fully capable of tailoring their taxation program to meet tribal needs without driving away important taxpayers.

At all events, there is no reason to suppose Congress intended to entrench a single permanent rule. Every indication is that the Indian Service was left free to vary

On the other hand, we encourage the elimination of provisions in many constitutions requiring Secretarial review. This is not required by Federal law.

By a Memorandum dated Jan. 13, 1984, this paper was distributed to all Area Directors of the Interior Department as a guide in reviewing tribal constitutions.

¹⁶ As early as 1975, the Mississippi Band of Choctaw adopted, and the Department approved, a revised constitution that did not require Secretarial review of taxing ordinances. Art. VIII, § 1(r). The Constitution of the Lac Courte Oreilles Band of Lake Superior Chippewa was amended in 1978, with Department agreement, to permit the imposition of "taxes or license taxes upon members and nonmembers doing business within the reservation," without Secretarial review. Art. V, § 1(n). In November 1980, the Port Gamble Indian Community of Washington amended its Constitution, with Department approval, so as to delete the requirement of Secretarial review for ordinances "providing for the licensing of nonmembers coming upon the reservation for purposes of hunting, fishing, trading, or other business." Art. IV, § 1(f). And the approved constitution adopted by the Fort Mojave Tribe in 1977 requires no Secretarial review of ordinances "regard[ing] the use of all reservation lands through zoning, taxation or otherwise," or "provid[ing] * * * the conditions upon which non-members may enter or remain on the reservation." Art. IV, § 1(L) and (O). See also the amended constitutions of the San Carlos Apache and the Hualapai Tribes and the Pueblo of Laguna, noticed at note 9, *supra*.

its practices in different settings and to alter them from time to time as changing circumstances might suggest. That is certainly how the Department of the Interior understood its task. It would be quite wrong to treat the early practice of writing Secretarial review provisions into tribal constitutions as reflecting a contemporaneous construction of controlling statutes as mandating that result. On the contrary, what should be accorded deference is the continuing administrative view that Congress never directed the Secretary to insist upon review of tax ordinances.

5. It is no contradiction that, at some periods, the B.I.A. asserted power independent of the I.R.A. and the Tribe's constitution to screen and veto some or all tribal enactments. See Getches, et al., *supra*, at 306-307. To claim such authority is not to say that tribal ordinances are invalid and without effect unless and until approved by the Secretary or his delegate. At least in the present context, one can assert a veto power in the Secretary and, at the same time, declare that affirmative approval is not a prerequisite to the effectiveness of the Navajo taxing ordinance. That is no different than the position of the Interior Department with respect to Tribes operating under I.R.A. constitutions: Through his power to disapprove new or amended constitutions, the Secretary can insist that taxing ordinances be submitted to his review or, as is current practice, he can encourage deletion of that requirement so that such ordinances become effective without his "pre-clearance."

The true rule, as it seems to us, was well summarized in a 1959 Memorandum from the Interior Solicitor's Office (J.A. 67):

It has been emphasized that "Indians are not wards of the Executive officers, but wards of the United States." (*Ex Parte Bi-A-Lil-Le*, 100 Pac 450 (1909); see Fed. Indian Law, 1958, p. 563)). Congress has not required the Secretary to approve tribal ordinances, nor has the President or the Secretary,

under authority delegated by Section 2 of 25 U.S.C., seen fit to issue regulations referring to Secretarial consideration or approval of tribal ordinances. Many tribal constitutions adopted pursuant to Section 16 of the Indian Reorganization Act (25 U.S.C. 476, 48 Stat. 987), contain provisions implying Secretarial consideration of tribal ordinances, at least, in special cases. These provisions were inserted by the Tribe with the consent of the Secretary. This is within his authority, but it is not a Congressional mandate.

Of course, as the quoted Memorandum recognizes (J.A. 67-68), there are some few cases—including encumbrances of tribal property—in which a statute expressly requires Secretarial approval. But taxation, even of non-members, is not such an instance.

6. Nor is it relevant, at least in the present context, that the Indian Trader statutes, 25 U.S.C. 261-264, were sometimes deemed to require federal approval of tribal taxation of licensed traders. That proposition is commonly attributed to an Opinion by Attorney General Wirt in 1824. 1 Op. Att'y Gen. 645, 649-650. In fact, however, the Attorney General was construing provisions of treaties with the Cherokees by which they were deemed to have *voluntarily relinquished* to the United States all regulatory power over traders. *Id.* at 646-649, 650, 651-652. See *Maxey v. Wright*, 54 S.W. at 808.¹⁷ Plainly enough, this is quite different from a holding that Congress unilaterally stripped all Tribes of their former power to tax traders. The latter point, it is true, has been mooted from time to time within the Interior Department. See 55 Interior Dec. 14, 48, 66, (1934); 60 Interior Dec.

¹⁷ It should also be noted that Attorney General Wirt was writing in a day when three now discredited doctrines held sway: that divided authority in Indian affairs and the regulation of commerce is unnatural, if not impossible; that federal permittees automatically enjoy the tax immunity of the United States itself; and that the power to tax is tantamount to "a power to destroy." See 1 Op. Att'y Gen. 645, 647-648, 650 (1824).

176 (1948); Cohen, *Handbook* 267; *Federal Indian Law* 381, 437.¹⁸ But the very limited scope of the "peculiar exemption" was noted more than a century ago. See 18 Op. Att'y Gen. 34, 38-39 (1884). And, significantly, it has never won endorsement from any court, despite repeated opportunities from *Crabtree v. Madden* in 1893 to *Merrion v. Jicarilla Apache Tribe* in 1982. On the contrary, the proposition was expressly rejected in *Mazey v. Wright*, *supra*.

In our submission, it is quite wrong to read a law that preempts regulation and taxation of Indian traders by the State (*Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980)), as necessarily also foreclosing tribal taxation. After all, the Indian Trader statutes were intended to benefit the Tribes by erecting a protective shield, or screen, against potentially unprincipled or hostile outsiders. The trader does not enjoy immunity because Congress was concerned to spare him, but only because the economic burden of any State tax would fall on the Indian consumer, without any compensating advantage to the Tribe. Obviously, this rationale is wholly inapplicable when the Tribe itself is, in effect, taxing its own citizens, presumably with their consent. Thus, it is extravagant to construe the Act of Aug. 15, 1876, ch. 289, § 5, 19 Stat. 200, now 25 U.S.C. 261, which vested "sole power and authority" to regulate traders in the Commissioner of Indians Affairs, as immunizing them from tribal taxes. So Congress evidently believed, since three years later, in 1879, it accepted the validity of the Chickasaw permit law that taxed, among others, licensed traders. See pages 7-9, *supra*.

At all events, the point is mooted in the case of the Navajo by a Department regulation that expressly permits tribal taxation of traders. 25 C.F.R. 141.11. See

¹⁸ The basic soundness of the proposition has been questioned in the most recent comprehensive treatise on Indian law. 1982 *Handbook* 436-437.

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. at 689-690. Besides, the mineral lessees involved here do not remotely fit the category of "licensed Indian traders." Although the fact is not dispositive (see *Central Machinery*, 448 U.S. at 165), it is instructive that they hold no licenses from the Commissioner of Indian Affairs under 25 U.S.C. 261. And, more important, they are not selling or bartering "goods," the only activity for which the statutes require a license. Cf. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616 (1980). Accordingly, oil and gas producers are no more within the reach of the license law than the logging company in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), or the building construction firm in *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982). Indeed, petitioner does not claim otherwise.

7. We must, however, address a related contention advanced under the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.* The assertion is that, except for Tribes organized under the I.R.A., the 1938 statute has preempted any pre-existing power to tax mineral production, or, at least, has conditioned any exercise of that power on Secretarial approval. Both versions of the argument wholly misapprehend the intent of Congress.

The stated prime objectives of the 1938 Act were to maximize tribal revenues from Reservation lands, to eliminate the gaps resulting from the existing patchwork of special provisions, and, with a single comprehensive statute, "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes"—all "in harmony with the Indian Reorganization Act." S. Rep. 985, 75th Cong., 1st Sess. 2, 3 (1937); H.R. Rep. 1872, 75th Cong., 3d Sess. 1, 3 (1938). See, also, Cohen, *Handbook* 328-329; *Merrion*, 455 U.S. at 186-187 n.46 (Stevens, J., dissenting). Given these goals, it would be most strange to find that the new statute created a radical distinction between Indian Tribes that had organized under the I.R.A. and those that had not—

preserving taxing authority over lessees for the first group, but abrogating it for the second. And, indeed, no such result can be attributed to the provision invoked, the proviso to Section 2 of the Act, 25 U.S.C. 396b:

Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to . . . [the IRA].

In practice, this proviso has no effect for most oil and gas leasing because the cited Sections of the I.R.A. do not authorize leases that continue in force indefinitely, so long as there is production "in paying quantities"—the almost universal formula.¹⁹ Nor can—or does—any I.R.A. constitution or charter authorize such long-term leases.²⁰

¹⁹ Section 16 of the I.R.A., 25 U.S.C. 476, does not confer any authority to lease, but merely permits the adoption of a constitution empowering the tribal council "to prevent the . . . lease . . . of tribal lands" (emphasis added). Section 17, 25 U.S.C. 477, provides for corporate charters which may empower the tribe to lease its lands, but not "for a period exceeding ten years." It should be noted that even this limited leasing power is not shared by all I.R.A. Tribes, but only those that obtained federal charters. See Op. Solic. Interior Dep't M-36040 (1950), reprinted in 2 *Opinions of the Solicitor of the Interior Relating to Indian Affairs* 1530. As of 1947, of the 195 Tribes covered by the I.R.A., only 131 had obtained corporate charters. Haas, *supra*, at 3, 21-30. In most cases, moreover, the charter continued to require Secretarial approval for leases, at least for a time. Cohen, *Handbook* 329-330 & n.475.

²⁰ In this context—disposition of tribal property or interests therein—express Congressional permission is required because of the "rudimentary" principle (*Owens Indian Nation v. County of Owens*, 414 U.S. 661, 670 (1974)), incorporated in the Non-Intercourse Act (25 U.S.C. 177), that Indian Tribes may not alienate their lands without the approval of the United States. This is, of course, in sharp contrast to the power of taxation, of which the Tribes have not been divested by virtue of their dependent status. *Coleville*, 447 U.S. at 153-154.

Thus, the upshot is that I.R.A. Tribes, like all others, are governed by the 1938 Act and the implementing regulations in respect of their oil and gas leasing. That was true in the case of the Jicarilla Apache Tribe involved in *Merrion*. See 455 U.S. at 135. And yet, of course, the Court there vindicated the tribal severance tax.²¹

Merrion thus forecloses—as against *all* Tribes, including the Navajo—petitioners' extreme contention that the 1938 Act wholly preempts tribal taxation of mineral production. What remains to be dealt with is a clumsy half-argument: that although not strictly preempted, tribal taxing power has been hobbled by a requirement of obtaining Secretarial approval in each case. This is an unusual proposition, to say the least, since it attributes to Congress the view that federal regulation of leases and tribal taxation of mineral production are *not* inconsistent in principle, and, at the same time, supposes that Congress invited the Secretary of the Interior to override its determination if he disagreed. Cf. *Tooahnippah v. Hickel*, 397 U.S. 598, 608-609 (1970). And, stranger still, it is said that the Secretary is not merely *empowered* to review tribal tax ordinances if and when he deems it necessary, but is *commanded* to do so in every case, regardless of his conclusion that such screening is not needed.

We may assume that, if he deemed it appropriate, the Secretary *could* promulgate regulations—whether under Section 4 of the 1938 Leasing Act, 25 U.S.C. 396d, or the

²¹ To be sure, the Court in *Merrion* quoted both the proviso to Section 2 of the 1938 Act (25 U.S.C. 396b) and the implementing regulation (25 C.F.R. 171.29 (1980), now 25 C.F.R. 211.29 (1982)). 455 U.S. at 150 & n.15. But there is no reason to suppose the Court considered these provisions critical. On the contrary, the Court prefaced its consideration of the preemption argument by quoting the caution from *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978), to "tread lightly" (455 U.S. at 149), and the Court had no difficulty rejecting the contention that the Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. 398a *et seq.*, had preempted tribal taxing power, albeit this statute of course contains no saving proviso for I.R.A. Tribes. 455 U.S. at 150-151.

more general authority given in 25 U.S.C. 2 and 9—requiring submission for approval of tribal ordinances taxing mineral production. But it simply does not follow that he *must* do so—or must review such ordinances even though he has declined to establish a regulatory procedure to that end where tribal law is silent. To read such a rule into the 1938 Act offends every applicable canon of construction. There are no “clear indications” of congressional intent to diminish tribal sovereignty in this way. *Merrion*, 455 U.S. at 149, 152. On the contrary, the purpose of the legislation—implementing the policy of the I.R.A.—to further tribal self-determination and self-sufficiency would be impaired by inferring such a condition. In these circumstances, it would be wholly inappropriate to impose upon the Secretary unwanted authority which Congress never expressly conferred and which, where given by tribal law, the Secretary is methodically retroceding.

8. Finally, we notice the objections interposed on the ground that the Navajo Tribe in particular, or at least its Council, lacks the requisite power to enact the taxing ordinance in suit. That is a truly extraordinary proposition as addressed to what is by far the most numerous Indian Tribe, with the largest Reservation, extending into three states and greater than the area of eight states. See *Getches, et al., supra*, at 4, 6. Nor does size alone distinguish the Navajo Tribe. It has been the focus of four of this Court’s modern landmark decisions stressing the survival of Indian Tribes as separate sovereignties and the continuing “authority of Indian governments over their reservations.” *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. at 689-690; *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 170 & n.6, 174-175, 179 (1973); *United States v. Wheeler*, 435 U.S. 313, 322-324, 326-327 (1978). It must come as a surprise to all to hear that the Navajos have failed to so order their affairs as to enjoy power to enact viable ordinances.

One remarkable suggestion is that the Navajos were divested of taxing authority by rejecting the I.R.A. in 1934 or by failing to adopt a constitution under Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 636. There is simply no basis in either statute for attributing to Congress any intent to “punish” Tribes that declined the offer by stripping them of preexisting powers. In the case of the I.R.A., there were, to be sure, some *additional* benefits—notably, financial help—that were reserved for Tribes accepting the new regime. See, e.g., 25 U.S.C. 470. But, as the Court has firmly held in *Colville* and *Merrion*, the power to tax nonmembers doing business on the Reservation is not new; nor does it derive from federal law. We cannot suppose—in the absence of the slightest hint—that Congress offered the Tribes the skewed choice suggested by petitioners and some of the amici: “If you do not accept the advantages we now tender, we will take away some of the prerogatives you presently enjoy.” Indeed, *Colville* expressly recognizes the continuing power of two “dissenting” Tribes (the Colville and the Lummi) to tax non-Indians doing business on the Reservation. See 447 U.S. at 143 n.11.

Equally insubstantial are arguments based on the failure of the Navajo to adopt a written constitution outside the I.R.A. or the history of the present Tribal Council as a creation of the Bureau of Indian Affairs. Only the most insular perspective would view a governmental body as lacking legitimacy or plenary authority merely because its pedigree is not traced to a popular constitutional convention and its powers are not defined by an entrenched constitution. One need only consider the British Parliament, which, from year to year, defines its own authority and evolved from a council of royal appointees. The first principle of sovereignty, after all, is that the form of government is a matter for self-determination. See 55 Interior Dec. at 30-32. It is quite enough that, today, the Navajo Tribal Council is popularly elected and, in the view of both the members of the Tribe and the Depart-

ment of the Interior, enjoys full legislative powers.²² This Court, we may add, has itself recognized the independent authority of the Navajo Council. *United States v. Wheeler*, 435 U.S. at 327-328. There is no ground whatever for treating this council as less independent or less authoritative than other tribal governmental bodies. On the contrary, because no provision of tribal law imposes any limitation on the powers of the Navajo Council, it is to be presumed that its acts are fully authorized—except only as they might transgress limits defined by federal law.

9. A circuitous road has led us back to the starting place. Given the now firm commitment of Congress to a policy of strengthening tribal self-government and promoting self-sufficiency,²³ we ought not strain old words to eke out a congressional intent to compel a reluctant Interior Department to review tribal taxing ordinances that bear against nonmembers who do business on the Reservation. See *Bryan v. Itasca County*, 426 U.S. 373, 388-389 n.14 (1976); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976). But, even if “clear indications” to that end were not required, there would be no basis for inferring such a result in any legislation enacted by Congress. See *Merrion*, 455 U.S. at 151-152. The conclusion must be that where tribal law does not provide otherwise—as it plainly does not in the case of the Navajo—the Tribe is free to tax business activity within its territory without first obtaining permission from the Secretary of the Interior.

²² The position of the Department is sufficiently reflected in the Memoranda of June 1959 (J.A. 66) and May 1978 (J.A. 70) in the record of this case.

²³ *E.g.*, Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77, 25 U.S.C. 1451 *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. 450 *et seq.* See *New Mexico v. Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 11 & n.17; *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59-60, 62-66.

This is no anomaly. It may be that the laws protecting tribal Indians from unscrupulous or unfriendly neighbors can be relaxed today. But it is not difficult to appreciate why Congress deemed it necessary, even in modern times, to interpose the supervision of the Interior Department when the Tribe or its members were being invited to alienate or encumber the land or to enter into long-term contracts, as with attorneys, or to buy goods on the Reservation. So, also, experience fully justified erecting a substantial shield to insulate the Reservation from the intrusion of State regulation and taxation. In both cases, Congress was discharging its responsibility as guardian of the Indians by *protective* legislation. Obviously, no such purpose would be served by hobbling the tribal power of taxation, the exercise of which against nonmembers cannot victimize the Tribe.

Fifty years ago, it is true, the Department of the Interior thought it prudent to screen such tribal tax proposals. That was presumably appropriate because of the disorganized and wholly dependent status of most Tribes, so unused to wielding sovereign power that, absent guidance, they might act improvidently. Even then, there were recognized exceptions. But, at all events, the direction is now firmly reversed and the Department is encouraging all Tribes to revise tribal law, where necessary, so as to dispense with the self-imposed requirement of submitting taxing ordinances to Secretarial approval.

The consequence is in no sense unjust. This Court has already vindicated the propriety of a Tribe taxing mineral activities within the bounds of the Reservation, where it provides substantial services. *Merrion*, 455 U.S. at 156-158. Indeed, the Court has suggested that, in this setting, the tribal tax has a stronger claim to legitimacy than one imposed on the same activity by the State. *Id.* at 158-159 n.26. There is no reason to fear that any Indian Tribe, or the Navajo in particular, will abuse the privilege if not checked by the Secretary. Certainly, the taxes in suit cannot be characterized as excessive. Nor is

it reasonable to suppose that, today, Tribes will be so unwise as to drive away potential taxpayers with vexatious assessments. More than ever, Reservation Indians must rely on their own revenues and they are far too cautious than to kill the goose that lays the golden egg.

Nor are the tribal taxes objectionable because they impose "taxation without representation." That is not the unique situation of nonmembers on an Indian Reservation, as is plain enough to residents of the District of Columbia, taxed and ultimately ruled by a Congress in which they have no voting representative. Certainly, petitioner has no standing to complain, being a foreign corporation (J.A. 6) with no greater vote in the Legislatures of New Mexico and Arizona than in the Navajo Tribal Council. Cf. *Thomas v. Gay*, 169 U.S. 264, 275-278 (1898). Besides, Secretarial review is not a remedy for the complaint. It would be strange indeed to view the Secretary of the Interior, who is charged with safeguarding tribal interests, as the "representative" of mineral lessees. Unsurprisingly, the Secretary has never disapproved a tribal tax bearing on non-Indians on the ground that no tax was appropriate or that the one proposed was too onerous. Nor do his new *Guidelines* authorize disapproval on such a basis. See Appendix to Respondents' Brief. If any check on tribal actions is needed, beyond self-restraint informed by self-interest, Congress is the appropriate agency to provide it. There is no question about congressional power to intervene should Indian Tribes act irresponsibly.

In the meanwhile, it is not open to argument that an Indian Tribe enjoys "the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory" (*Morris v. Hitchcock*, 194 U.S. at 389) and that one of those conditions may be subjection to taxation in respect of activities undertaken on the Reservation, even if the actual tax was not announced in advance (*Merrion*, 455 U.S. at 137-148). We are not dealing with home-

steads who were in some sense "invited in" by Congress through the General Allotment Act or some "opening up" legislation. Cf. *Montana v. United States*, 450 U.S. 544, 559-560 & n.9 (1981). Petitioner is simply a private commercial venture seeking profit from business operations on tribal lands and cannot complain when the local government follows familiar tradition and imposes a tax on that privilege. Cf. *United States v. Mazurie*, 419 U.S. 544, 557-558 (1975); *Williams v. Lee*, 358 U.S. at 223.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

KERR-MCGEE CORPORATION,
v. *Petitioner,*

THE NAVAJO TRIBE OF INDIANS, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.,
THE CHEYENNE RIVER SIOUX TRIBE OF THE
CHEYENNE RIVER RESERVATION, SOUTH DAKOTA,
THE NEZ PERCE TRIBE OF IDAHO,
THE PUEBLO OF LAGUNA OF NEW MEXICO AND
THE SENECA NATION OF INDIANS OF NEW YORK
IN SUPPORT OF RESPONDENTS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-68

KERR-MCGEE CORPORATION,

v. *Petitioner,*

THE NAVAJO TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.,
THE CHEYENNE RIVER SIOUX TRIBE OF THE
CHEYENNE RIVER RESERVATION, SOUTH DAKOTA,
THE NEZ PERCE TRIBE OF IDAHO,
THE PUEBLO OF LAGUNA OF NEW MEXICO AND
THE SENECA NATION OF INDIANS OF NEW YORK
IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36.2, the Association on American Indian Affairs, Inc., a tax-exempt organization, having its principal office at 95 Madison Avenue, New York, New York 10016; the Cheyenne River Sioux Tribe, having its principal office at P.O. Box 590, Eagle Butte, South Dakota 57625; the Nez Perce Tribe, having its principal office at P.O. Box 305, Lapwai, Idaho 83540; the Pueblo of Laguna, having its principal office at P.O.

Box 194, Laguna, New Mexico 87026; and the Seneca Nation of Indians of New York, having its principal office at 1500 Route 438, Irving, New York 14081, file the attached brief *amici curiae* in support of the Respondents in the above-captioned case. Petitioner, Kerr-McGee Corporation, and Respondent, the Navajo Tribe of Indians, *et al.*, have consented in writing to the filing of this brief.

INTEREST OF AMICI CURIAE

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *The County of Oneida v. The Oneida Indian Nation*, Nos. 83-1065 and 83-1240 (filed July 16, 1984), *Solem v. Bartlett*, 104 S.Ct. 1161 (1984), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and numerous others.

The tribal *amici* are all federally recognized Indian tribes—two of which have organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* ("IRA") and two of which have not. Both Indians and non-Indians reside on the respective reservations of tribal *amici*.

The Pueblo of Laguna is organized pursuant to the IRA. The Pueblo Council's powers under its present constitution include, but are not limited to, the power "to

levy and collect taxes . . . from any member or other person or entity residing on or engaged in an activity on the lands of the Pueblo. . . ." Article IV, Section 2(f). The constitution nowhere provides for Secretarial review and approval of tribal tax ordinances. A holding that all tribal taxes must be approved by the Secretary of the Interior would overturn the decision made by the Pueblo and accepted by the Secretary of the Interior to eliminate federal supervision over the Pueblo's law-making.

The Cheyenne River Sioux Tribe also is organized pursuant to the IRA. Under its present constitution, the Secretary has only limited powers of review with respect to the Tribe's exercise of its taxation powers. Thus, a holding that Secretarial approval is required for all tribal tax ordinances would contradict a policy decision made by the Tribe at the time it adopted the constitution and impliedly confirmed by the Secretary when he subsequently approved the document.

The Nez Perce Tribe is not organized pursuant to the IRA. Under Article VIII, Section 1(c) of the Nez Perce constitution, the Nez Perce Tribal Executive Committee has authority, not subject to Secretarial review, to ". . . promulgate and enforce ordinances governing the conduct of all persons and activities within the boundaries of the Nez Perce reservation. . . ." A holding that the Secretary of the Interior is required to approve all tribal tax ordinances would have the effect of restoring Secretarial supervision over tribal lawmaking that was removed by the Tribe in its constitutional convention in 1983, which removal was approved by the Secretary of the Interior.

The Seneca Nation of Indians of New York also is not organized under the IRA. The Seneca Nation's Tribal

Council is governed by a constitution adopted originally in 1848 and last amended in 1978. In section XIII of the constitution, the Council has authority to enact laws and regulations free of Secretarial review and approval. A holding that all tribal taxes must be reviewed and approved by the Secretary of the Interior would dismantle a governmental process which has functioned efficiently and effectively for well over a century.

This case presents the important questions of (1) whether all tribes possess the inherent power to tax both Indians and non-Indians on their reservations, regardless of their form of government, and (2) whether tribes may exercise their inherent power to tax without first obtaining the consent of the Secretary of the Interior.

To facilitate the Court's consideration of the broad legal and policy issues in this case, *amici* intend to address the above described question in a manner somewhat different from the Respondent. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) all Indian tribes, regardless of their form of government, possess the power to tax both Indians and non-Indians on their reservations as an incident of their original sovereignty, except where Congress or the tribe has provided expressly for a divestiture of such power; (2) the power of tribes to tax both Indians and non-Indians on their reservations without first obtaining Secretarial consent is consistent with the tribes' dependent status and is important as a flexible and efficient means to raise revenue for greatly needed services to Indians and non-Indians for which tribes primarily are responsible; and (3) numerous public policy reasons favor this Court's concurrence with the decision of the Secretary of the Interior that he need not review and approve the Navajo Tribe's tax ordinances.

SUMMARY OF ARGUMENT

The power of Indian tribal governments to tax both Indians and non-Indians on their reservations was affirmed by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), as an incident of tribes' inherent sovereignty. To generate desperately needed revenues for essential services available both to Indians and non-Indians, the Navajo Tribe enacted comprehensive, sophisticated value-added and property taxes applicable to Indian and non-Indian mineral producers, wholesalers and others conducting business on the reservation. Petitioner now seeks to distinguish *Merrion* by arguing that the Navajo Tribe's taxes are invalid without approval by the Secretary of the Interior.

A holding by this Court that all tribal taxes must be approved by the Secretary of the Interior would fly in the face of this Court's longstanding adherence to the fundamental principles governing the scope of tribal sovereignty and how that sovereignty properly might be divested or limited. Moreover, such a holding would controvert this Court's reasoning in *Merrion* that the power of Indian tribes to tax both Indians and non-Indians on their reservations is consistent with the tribes' dependent status, particularly since property, and not liberty, interests are at stake.

In this case, the Secretary of the Interior determined that he need not review and approve the Navajo Tribe's taxes. Consistent with past precedent, the Court should defer here to Congress in the exercise of its plenary power over Indian tribes and to the agencies responsible for Indian affairs in the exercise of their discretion for a determination of whether and how the sovereign taxing power of tribes should be limited. The vast complexities inherent in dealing with over 500 federally recognized tribes with diverse legal institutions and cultures argue strongly in favor of judicial restraint and deference to the branches of the federal government closest to the

affairs of Indian tribes. Moreover, the Secretary's decision accords with past and present federal Indian policy supporting the strengthening of tribal government on the reservations.

Significantly, until Congress acts to limit the exercise of tribes' inherent taxing authority by imposing a requirement for Secretarial review and approval, Petitioner and others similarly situated have numerous alternative, effective remedies which can ensure tribal taxes are not confiscatory or otherwise conflict with the Indian Civil Rights Act. Those remedies include appeals to tribal forums, as this Court emphasized in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), federal court review pursuant to federal question jurisdiction over claims that the tribe is without particular powers to enforce its taxes and, possibly, federal court review pursuant to federal question jurisdiction under the Indian Commerce Clause or Interstate Commerce Clause of the United States Constitution.

ARGUMENT

I. THE POWER OF INDIAN TRIBES TO TAX INDIANS AND NON-INDIANS ON THEIR RESERVATIONS IS AN INCIDENT OF THEIR ORIGINAL SOVEREIGNTY WHICH HAS NOT BEEN DIVESTED OR CURTAILED BY FEDERAL LAW

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court upheld an Indian tribe's power to levy taxes upon non-Indians conducting business within a reservation as an incident of the Tribe's original, inherent sovereignty. Petitioner seeks to distinguish *Merrion* on the grounds that the Navajo Tribe is "unorganized" and that the Possessory Interest Tax and Business Activities Tax at issue here were not approved by the Secretary of the Interior. The holding sought by Petitioner would emasculate the sovereign powers of Indian tribes, which this Court repeatedly has recog-

nized, and would impose upon the Secretary a duty which no federal law requires or authorizes him to perform.

A. Tribal Taxation of Non-Indians Doing Business on Indian Reservations Is Not Inconsistent with the Tribes' Dependent Status or Otherwise Axiomatically Precluded by the Federal-Traded Relationship.

Since the earliest years of the Republic, judicial, legislative and executive branch decisions regarding the powers of Indian tribes have adhered to three important principles. First, during the pre-colonial period, Indian tribes constituted distinct, independent political communities and possessed all sovereign powers that characterize any sovereign state, including, in a more modern context, the power of taxation. *United States v. Wheeler*, 435 U.S. 313 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); F. Cohen, *Handbook of Federal Indian Law* (1982 Ed.) 232 ("Cohen"). Second, by virtue of their relationship to European colonizers and, subsequently, the United States, Indian tribes lost such significant attributes of sovereignty as the power to enter into treaties with foreign nations (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); 55 I.D. 14, 22, "Powers of Indian Tribes" (1934)), the power unilaterally to alienate tribal lands (*Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)), and, as recently postulated by the Court, also those powers which are "inconsistent with their dependent status." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). Third, by virtue of their relationship to the United States, Indian tribes also are subject to the plenary power of Congress further to remove or qualify their remaining sovereign powers, but to the extent not so limited, their original powers still are retained. Cohen at 241-242.

The sovereign power of Indian tribes to tax both Indians and non-Indians doing business on their reserva-

tions plainly is not impaired by their loss of authority over foreign relations or land alienation. Moreover, this Court has determined that tribal taxes covering on-reservation commercial activities validly can be imposed upon non-Indians and, therefore, such taxes cannot be deemed inherently inconsistent with the tribes' dependent status. *Merrion v. Jicarilla Apache Tribe*, *supra*; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).¹ Thus, the sole question before the Court is whether Congress, in the exercise of its plenary power, has required Secretarial approval of tribal tax ordinances or has limited taxation of non-Indians to tribes which have adopted constitutions and charters under the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461, 476, 477, or a like federal statute.

This Court has never suggested, much less found, that the Secretary of the Interior possesses some unspecified, yet broad and overriding authority to pass upon the governmental acts of Indian tribes pursuant to any general federal legislation. (See pp. 15-18, *infra*.) To the contrary, in considering whether a limitation of tribal sovereignty has occurred, the Court repeatedly has ruled that, in order to nullify or qualify Indian sovereign powers, Congress must clearly manifest its intention to do so in the words of a statute or in its legislative history.² *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). The two statutes upon which Petitioner relies fail to meet that critical test.

¹ In so determining, the Court has distinguished property interests from the liberty interests at stake in *Oliphant*, 435 U.S. 191, in which the Court held Indian tribes may not prosecute and convict non-Indians because by virtue of their dependent status tribes lost their original power to restrain the liberty interests of non-Indians.

² Similarly, "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

B. Federal Statutes Do Not Divest or Limit the Inherent Power of All Indian Tribes to Tax Indians and Non-Indians on Their Reservations.

1. Congress Intended in the Indian Reorganization Act to Provide for the Expansion of Tribal Powers and Strengthening of Tribal Government on the Reservation.

In the years just preceding passage of the Indian Reorganization Act, 48 Stat. 984 (1934) ("IRA"), federal Indian policy was departing from the assimilationism embodied in the General Allotment Act of 1887, 24 Stat. 388, towards a policy of encouraging tribal political and economic self-determination. Cohen at 145-49. The IRA was the apex of this movement to strengthen tribal government on the reservations. To help achieve that objective, Congress provided a package of benefits, including an *optional* means for tribes to create a centralized form of government ("Any Indian tribe . . . shall have the right to organize for its common welfare, and *may* adopt an appropriate constitution. . . ." (emphasis added) 25 U.S.C. § 476); confirmation and restoration of certain tribal powers which previously had been limited by Congress (*e.g.*, the restoration of tribal consent to the "sale, disposition, lease, or encumbrance of tribal lands . . .," *ibid*); authority for the acquisition of tribal lands lost through allotment and extension of federal loans for tribal economic development. 25 U.S.C. §§ 465, 470.

To avail themselves of the IRA's generous package of benefits, many tribes organized under the Act, but many did not. Getches, *Federal Indian Law* (1979) at 83. With respect to those tribes that did so organize, a substantial portion adopted constitutions incorporating boilerplate language furnished to them by the Department of the Interior, which draft language contained numerous authorities for the Secretary of the Interior to review and

approve tribal actions.³ Significantly, Secretarial review was not required by the IRA or any other law, and thus some IRA tribes in their constitutions chose not to authorize the Secretary to review their ordinances. The Secretary, as required under the IRA, in fact has approved both categories of constitutions—namely, those with and those without Secretarial review and approval authority over tribal lawmaking. *See, e.g.,* Constitution of *Amicus Curiae* Pueblo of Laguna, 1958 and 1984 versions, wherein the Pueblo Council's powers include the right "[t]o levy and collect taxes, . . ." without a requirement of Secretarial review and approval. Article IV, Sec. 2(f); both the 1958 and 1984 versions of the Pueblo's Constitution were approved by the Secretary of the Interior.

Petitioner does not cite, and cannot cite, any provision in the IRA or in its legislative history where Congress manifested a plain intent to divest or restrict the inherent powers of tribes to tax on their reservations. Indeed, precisely the opposite conclusion is compelled by the text of the Act, which states in pertinent part:

... In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or tribal council the following rights and powers: . . . (Emphasis added.)

25 U.S.C. § 476. In an interpretive opinion issued shortly after passage of the IRA, the Solicitor for the Department of the Interior expressed the view that the "powers vested in any Indian tribe or tribal council by existing law," *i.e.*, pre-IRA, included the power to levy and col-

³ The provision of specific authorities for Secretarial review of tribal lawmaking in the boilerplate constitution offered by the Department of the Interior lends further support to the argument that, without specific Congressional or tribal authorization, the Secretary may not substitute his judgment for that of tribes in regard to their governmental acts.

lect taxes from both Indians and non-Indians on the reservation. 55 I.D. 14, 16, 48 (1934). The IRA on its face confirmed that power in tribes which organized thereunder. The IRA, however, nowhere removed that power from tribes that did not so organize—a result which would have been wholly antithetical to its avowed purpose of strengthening tribal government.

Petitioner argues that this analysis leads to the allegedly anomalous conclusion that tribes organized under the IRA possess less freedom to tax non-Indians than unorganized tribes. Pet. Br. at 32. Petitioner's contention is factually inaccurate since, as previously noted, some IRA tribes have the power in their constitutions to adopt tax ordinances without Secretarial approval.⁴ Moreover, even if the anomaly postulated by Petitioner actually existed, the remedy would lie with an amendment to the IRA by Congress, not in asking this Court to find words of limitation in the Act which simply are not there. In sum, given the absence of any language in the statute or its legislative history which purports, either expressly or impliedly, to curtail Indian sovereignty, Petitioner's argument that Congress intended in the IRA to restrict tribal autonomy by requiring all tribes to organize thereunder to protect their inherent powers and, furthermore, that substantial federal supervision of all tribal lawmaking, not anywhere previously authorized, for the first time was contemplated in the IRA necessarily must fail.

⁴ The record does not show and it would be pointless to speculate whether particular IRA tribes surrendered their power to tax without Secretarial approval in a knowing exchange for other benefits under the Act, because they were badly advised by the Bureau of Indian Affairs (a distinct possibility in the light of history), or because taxation of non-Indians was not a major concern during the 1930's. The fact that tribes organized under the IRA may have given up some tax powers is irrelevant for purposes of considering the tax authority of tribes which did not so organize.

2. Congress Intended in the 1938 Mineral Leasing Act to Provide a Comprehensive and Uniform Scheme for the Disposition of Tribal Proprietary Interests in Mineral Resources, While Leaving Unencumbered Tribal Governmental Powers to Tax Mineral Development.

Petitioner next asserts that Congress in the Mineral Leasing Act of 1938, 52 Stat. 347, 25 U.S.C. § 396(a)-(g) ("1938 Act"), preempted the Navajo Tribe's power to impose taxes on mineral development activities. Pursuing this argument, Petitioner seeks to distinguish the Court's direct holding to the contrary in *Merrion v. Jicarilla Apache Tribe*, *supra*, on the ground that the 1938 Act gives effect to the governmental powers of IRA tribes, such as the Jicarilla Apache, but not the governmental powers of unorganized tribes, such as the Navajo. Pet. Br. at 37-39. The language and purpose of the statute, however, do not support this claimed distinction.

As this Court emphasized in *Merrion*, "[t]he mere fact that the government imposing the tax also enjoys rents and royalties as the lessor of mineral lands does not undermine the government's authority to impose the tax." 455 U.S. at 138. The proprietary interest of Indian tribes in their mineral resources and the governmental interest of Indian tribes in taxing mineral development activities are wholly distinguishable because they arise from two different legal sources—namely, the tribe as a landowner and the tribe as a sovereign. Petitioner's protestations notwithstanding, the governmental power to raise tax revenues is independent of, not incidental to, the power to lease property. Thus, even assuming, *arguendo*, that Congress in the 1938 Act preempted the power of non-IRA tribes to regulate mineral operations, the power of all tribes to tax the business of mining would remain unimpaired.

Petitioner's reliance for its preemption argument upon the proviso in section 2 of the 1938 Act, which permits

tribes organized *and incorporated* under the IRA to lease lands in accordance with their constitutions and charters, is clearly misplaced. Section 16 of the IRA, under which tribes can organize, contains no new or separate leasing authority; section 17, under which organized tribes can incorporate, does authorize leasing, but not "for a period exceeding ten years. . . ." 25 U.S.C. § 477. Since mineral leases generally run for a term of years "and as long thereafter as minerals are found in paying quantities," *i.e.*, longer than ten years, the right of IRA tribes under the 1938 Act to exempt themselves from Secretarial supervision is largely illusory. *Cf.* 25 C.F.R. § 211.29 ("The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.").

Petitioner's preemption argument also proves too much. The Navajo taxes here at issue cover not only mineral development activities, but also commercial and industrial operations conducted by both Indians and non-Indians. On almost all Indian reservations, the latter operations ordinarily take place on lands leased by the tribe, with the approval of the Secretary of the Interior, pursuant to the Long-term Leasing Act of 1955, as amended, 69 Stat. 539, 25 U.S.C. § 415 ("1955 Act"), which does not discriminate between IRA and non-IRA tribes. Thus, if subjecting tribal leases to detailed regulation by the Secretary preempts tribal taxing powers, as Petitioner claims, then Congress silently, but unequivocally must have precluded IRA tribes from taxing commercial and industrial operations under the 1955 Act, even though like taxes upon mineral development activities under the 1938 Act are sanctioned.⁵ *Merrion v. Jicarilla Apache Tribe*, *supra*. Not one word in the 1955 Act

⁵ Conversely, if the 1955 Act does not preempt the taxing powers of IRA tribes, then it also must not preempt the taxing powers of

or its legislative history lends support to such a bizarre result.

Finally, Petitioner's argument literally stands the federal preemption doctrine on its head. In previous cases, the Court has invoked that doctrine to oust state jurisdiction on an Indian reservation where federal and tribal interests sweep so broadly over the activity in question that no room is left for state regulation. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). In short, the preemption doctrine has been employed to protect, not divest, tribal authority and has no application where, as here, the federal statute involved (1938 Act) is consistent with and, indeed, designed to encourage the exercise of tribal sovereign powers.

As trustee, the United States must consent to every method by which interests in Indian lands are alienated, including, of course, sale of the underlying minerals. Before 1938, the requisite consent to the sale of their mineral resources had been granted to most tribes in numerous piecemeal leasing acts. *See, e.g.,* 25 U.S.C. §§ 396, 397, 398, 398a, 398b, 399, 400a, 401, 403 and 477 (IRA). In general, Congress intended in the 1938 Act to supplant these diverse earlier statutes by establishing a uniform and more comprehensive scheme for the leasing of minerals on Indian lands, while yet preserving the specific tribal leasing authorities contained in the recently enacted IRA. 25 U.S.C. § 396b; *see* H.R. Rep. No. 1872, 75th Cong., 3d Sess. at 1-3 (1938), and S. Rep. No. 985, 75th Cong., 1st Sess. at 2-3 (1937).

⁵ [Continued]

unorganized tribes and the Navajo tax ordinances are valid with respect to commercial, industrial and other business operations. Petitioner, however, cannot show that Congress ever intended to draw a distinction between mining and other business activities for purposes of tribal taxation.

Petitioner cannot cite any language in the 1938 Act or its legislative history which indicates, expressly or impliedly, an intent on the part of Congress to divest, limit or even deal with tribal governmental powers. To the contrary, the 1938 Act, like the IRA, plainly was designed to foster tribal economic development and, in particular, to help achieve the federal policy of strengthening tribal governments in part by vesting leasing decisions in the tribes instead of the Indian agents, as was the procedure under some earlier leasing acts. *See* 25 U.S.C. § 399; *compare* 25 U.S.C. § 476 (granting Indian tribes the right "to prevent the sale, disposition, lease, or encumbrance of tribal lands . . . without the consent of the tribe. . ."). Congress could have addressed tribal taxing powers in the 1938 Act, but did not. Given this omission, as well as the legal and historic background of the legislation, the conclusion is inescapable that Congress could not have intended, in a statute concerned only with the leasing of tribal property interests, to circumscribe tribal governmental powers, regardless of whether or how the tribes might be "organized."

C. Absent Tribal Consent, the Secretary of the Interior Lacks Authority under Existing Federal Law to Approve Tribal Tax Ordinances or Otherwise to Qualify the Tribes' Inherent Power to Tax.

On numerous occasions, most of which are cited by Petitioner (Br. at 15, n.6), Congress expressly has empowered the Secretary of the Interior to review tribal actions. *See, e.g.,* 25 U.S.C. §§ 81, 121-25, 263, 311-21, 415. Congress, however, has not granted the Secretary any specific authority to review and approve tribal tax ordinances, and the Navajo Tribe has not voluntarily consented to the exercise of Secretarial supervision over its inherent power to tax. In the absence of specific legislation or tribal consent, the Secretary plainly appears to lack authority to pass upon the validity or wis-

dom of tribal taxes—and he has taken precisely that position in this case. The Court should do likewise.

Petitioner, however, seizes upon a statement in *Merrion* that “the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect” (455 U.S. at 141, 155) and builds out of it an argument that no tax on non-Indians by any tribe is valid without Secretarial sanction. Pet. Br. at 16-19. This statement and similar references to Secretarial approval in *Merrion* obviously are quoted out of context. The Jicarilla Apache Tribe is governed by a constitution which expressly provides that ordinances imposing a tax upon non-members doing business on the reservation are “subject to approval by the Secretary of the Interior” (455 U.S. at 135), and Secretarial approval, therefore, was a condition precedent to validity of the Jicarilla Apache tax. The Navajo Tribe, other unorganized tribes and many IRA tribes are not so governed.

In a further misreading of *Merrion*, Petitioner stresses Justice Marshall’s footnoted point that an amendment to the Jicarilla Apache Constitution was “the critical event necessary to effectuate the tax” (455 U.S. at 148, n.14, emphasis in original, cited at Pet. Br. 16), arguing therefrom that the Court already has held adoption of an IRA constitution and prior Secretarial approval to be essential to implementation of a tribal tax. Pet. Br. at 16-17. Justice Marshall’s conclusion, though, clearly was addressed to the unique constitutional history of the Jicarilla Apache Tribe. For the Navajo Tribe, which has no like history, the critical language in this portion of the *Merrion* opinion is Justice Marshall’s earlier point, in the same footnote, that a tribe’s constitution is not the font of its sovereign power and “[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power to tax remains intact.” 455 U.S. at 148, n.14. In short,

a requirement that Secretarial approval be given before tribal tax ordinances are effective cannot be found in the Court’s reading of the IRA.⁶

Similarly, no authority for conditioning tribal tax powers upon Secretarial review may be implied from 25 U.S.C. §§ 2 and 9, which empower the Commissioner of Indian Affairs and the President to promulgate and enforce regulations governing Indian affairs. Indeed, a mere reading of these statutes should completely dispel that thesis. 25 U.S.C. § 9, for example, stipulates:

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

The plain meaning of the language in § 9 is that the President is authorized to enforce with reasonable regulations the specific duties with respect to Indian affairs found in other federal statutes. Stated another way, in and of itself § 9 is not authority for the executive to undertake any function outside of the specific responsibilities which Congress has elsewhere provided. *Romero v. United States*, 24 Ct. Cl. 331 (1889).

In like vein, the legislative history of § 2 indicates that the primary purposes of that section were to transfer Indian affairs out of the Department of War and into the Department of the Interior and to authorize the promulgation of rules and regulations for carrying into effect the directives found in other specific acts of Congress. 5 Op. Atty. Gen. 36 (1848); *United States v. Van Wert*, 195 F. 974 (D.C. Iowa, 1912). Here, too, in and

⁶ The Court’s observation that Secretarial review, in addition to the plenary power of Congress to restrict tribal sovereignty, “minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner” (455 U.S. at 141) does not rise to the conclusion that Secretarial approval is a prerequisite to tribal taxation. The same safeguards can be achieved through a number of alternative proceedings. See, pp. 25-28, *infra*.

of itself § 2 cannot serve as authority for the Secretary to divest or limit the inherent sovereign right of tribes to tax because such authority does not exist in other congressional enactments.

Given the absence of action by Congress, this Court should not labor to find a requirement that the Secretary review and approve every exercise of tribal tax powers—particularly in view of the strong tribal interests at stake in this case.⁷ *Merrion v. Jicarilla Apache Tribe*, *supra*; *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*. Instead, consistent with the rule that limitations on tribal sovereignty must be clearly expressed in a statute or its legislative history (*see* p. 8, *supra*), the Court should find that the Secretary lacks supervisory authority with respect to the Navajo Tribe's right to tax.

II. EVEN IF THE SECRETARY HAS THE POWER UNDER FEDERAL LAW TO REVIEW TRIBAL TAX ORDINANCES, THE AUTHORITY IS DISCRETIONARY, AND IN LIGHT OF SETTLED LEGAL PRINCIPLES AND COMPELLING POLICY CONSIDERATIONS, GREAT DEFERENCE SHOULD BE ACCORDED THE DECISION OF THE SECRETARY NOT TO EXERCISE HIS DISCRETION.

A. With Respect to the Management of Indian Affairs, Courts Uniformly Have Accorded Great Deference to Decisions of the Secretary Made in the Exercise of His Discretionary Authority Under Federal Law.

Conceding for purposes of argument only that 25 U.S.C. §§ 2 and 9 empower the Secretary to review an exercise of the inherent tribal power to tax, that author-

⁷ In an effort to lend a gloss of hardship to its position, Petitioner lays before the Court a parade of horrors in enforcement of the Navajo tax ordinances from which it does not actually now suffer. Pet. Br. at 40-41. The Court should not be misled into creating an unprecedented new remedy for a presently non-existent wrong.

ity on the face of the statutes themselves plainly is discretionary. In 25 U.S.C. § 2, the Commissioner is vested with the general management of Indian affairs, but the provision contains no language whatsoever defining or limiting the manner in which the authority is to be exercised. Similarly, under 25 U.S.C. § 9, "the President *may* prescribe such regulations as he *may* think fit" (emphasis added)—thus leaving no doubt that the Secretary's administration of Indian affairs pursuant to the foregoing provisions is fundamentally a matter of discretion. Significantly, courts reviewing the decisions of the Secretary and other federal agencies charged with the management of Indian affairs have emphasized repeatedly the great deference which is to be accorded agency interpretations of the scope of their discretion and its exercise. *See, generally, Udall v. Tallman*, 380 U.S. 1 (1965); *Board of Commissioners of Pawnee County v. United States*, 139 F.2d 248 (10th Cir. 1943); *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971); *National Indian Youth Council v. Bruce*, 485 F.2d 97 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), *reh. denied*, 419 U.S. 886 (1974).

The reasons for the deference which is accorded decisions of the Secretary in the area of Indian affairs are apparent. Under federal law and regulations the Secretary is the federal official primarily charged with carrying out the responsibilities of the United States with respect to Indian tribes. In performing this function for over a century, the Secretary has acquired considerable expertise and understanding concerning Indian matters.

Furthermore, the area of Indian affairs is undeniably complex from a legal and cultural standpoint. Over 500 tribes, including both IRA and non-IRA tribes, are recognized by the United States, and their cultural and political structure and organization vary tremendously. Getches, *Federal Indian Law* 5 (1979). The tribes range in membership from 15 to 146,000, and the size of their

reservations varies from 50 acres to over 13 million acres. *Id.* at 4-5. The size of tribal governing bodies ranges from three to seventy-eight. *Federal and State Indian Reservations*, U.S. Department of Commerce (1975).

In light of these numerous complexities and the Secretary's experience and expertise in dealing with them, the deference which the judiciary historically has paid to his decisions concerning Indian affairs is justified. Thus, the Court should be extremely reluctant to impose upon the Secretary a specific duty with respect to Indian affairs which the Secretary, in his lawful discretion, has declined to perform.

B. The Secretary's Decision Not to Review the Navajo Tax Ordinances Conforms Completely with Past and Present Federal Indian Policy Which Is Intended to Promote the Political Self-Determination and Economic Self-Sufficiency of Indian Tribes.

With only a brief exception in the early 1950's, the overriding objectives of federal Indian policy for the past half century have been to promote the political self-determination and economic self-sufficiency of Indian tribes. Enactment of the seminal IRA in 1934 signalled a dramatic reversal of the previous federal policy of dismantling reservations and assimilating Indians into non-Indian society. The IRA's principal goal was to strengthen tribal governments, and it did so in significant part by modifying or limiting the supervisory practices of the Interior Department over the activities of tribes, thereby enabling tribes to exercise more fully the inherent powers of government they possessed. Cohen at 129-30.

In 1970 President Nixon emphatically reaffirmed this Indian policy in a formal Administration declaration:

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian peo-

ple. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970). In accordance with this statement, Congress subsequently enacted two pieces of legislation proposed by the President which further freed the tribes from needless federal bureaucratic interference, and provided them with real opportunities to govern the affairs of their reservations. See Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 25 U.S.C. §§ 545n, 455-58e; Indian Financing Act of 1974, Pub. L. No. 93-262, 25 U.S.C. §§ 1451 *et seq.*

More recently President Reagan issued yet another Indian policy statement which emphasized identical themes:

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination. . . .

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal gov-

ernments which are responsive and accountable to their members. . . .

Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing reservation economies.

White House Indian Policy Statement (January 23, 1983).

The Secretary's decision not to review the Navajo tax ordinances is in clear accord with the dictates of the federal Indian policy statements quoted above. Specifically, where an inherent power of tribal government as fundamental as the authority to tax is involved, the Secretary's withholding from the exercise of a discretionary right to review not only is appropriate, but, indeed, represents a salutary effort on his part to afford a broad scope for the efforts of tribes to determine their own futures. *See, generally, Merrion v. Jicarilla Apache Tribe, supra.*

The Secretary's conclusion is even more compelling given the present economic circumstances of most Indian tribes, including the Navajo. In consonance with President Reagan's Indian policy statement and for other unrelated reasons, federal funding on Indian reservations has declined dramatically as the Administration has sought to emphasize the private sector at the direct expense of federal program monies. *See Letter to the Honorable Pete Domenici, Chairman, Senate Budget Committee, from the Honorable Mark Andrews, Chairman, Senate Select Committee on Indian Affairs, Transmitting*

Budget Views and Estimates for Fiscal Year 1985, at pp. 3-4. In direct proportion to the diminution of federal funds, Indian tribes increasingly have been required to bear the burden of providing basic governmental services on Indian reservations.

More important, the beneficiaries of the tribal governmental services are not limited to members of the tribe itself. The Petitioner and its *amici*, for example, which voluntarily entered the Navajo Reservation to remove nonrenewable resources for a profit, also plainly benefit from the Navajo Tribe's provision of basic governmental services throughout the reservation. The protestations of Petitioner and its *amici* in opposition to a tribal tax are especially inappropriate at a time when their federal tax burden has been reduced significantly and any tribal taxes which they might pay are deductible for federal taxation purposes under the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607, as amended by Pub. L. No. 98-369 (1984). Under the foregoing circumstances, Petitioner hardly should be heard to complain about the Secretary's failure to review the Navajo Tribe's exercise of its inherent tax powers.

C. The Secretary's Decision Also Is Justified Fully by the Tribe's Full and Careful Consideration and Enactment of Its Taxes and Implementing Regulations.

The Navajo Tribal Council created the Navajo Tax Commission in 1974, but the Tribe did not enact the taxes at issue here until 1978. In the interim, the Tribe undertook a careful and exhaustive study of the economic and legal issues associated with a Tribal taxation program. In presenting tax proposals to the Navajo Tribal Council, the Navajo Tax Commission emphasized that it

proposed broad-based taxes applicable to both Indians and non-Indians which are fair and efficient, and which, in the early years, would tap the major sources of wealth on the Navajo Reservation.⁸ See *Report of the Advisory Committee of the Navajo Tribal Council Regarding Navajo Tax Proposals* (November, 1976).

Following enactment of the Navajo tax laws as proposed by the Commission, two public hearings were held to receive comments on the Tribe's proposed regulations. Because of litigation challenging the Tribe's taxes, final regulations were not adopted, and the Navajo Tax Commission subsequently held yet another public hearing on its proposed tax regulations in November, 1984. Without exception, potential non-Indian taxpayers, including many of Petitioner's *amici*, were invited to and many did present very helpful oral and written comments on the Tribe's proposed regulations.

In view of the comprehensive and thorough consideration by the Navajo Tribe of appropriate tribal taxes and the consistent efforts by the Tribe to involve its potential taxpayers in the development of sound and fair procedures for tax enforcement, the decision of the Secretary not to review the Navajo tax ordinances should be

⁸ *Amicus Curiae* Texaco, Inc. suggests that the Navajo Tribe enacted its taxes pursuant to a belief that the Tribe was not being compensated adequately in royalties and thus needed to tax Petitioner and its *amici*. In support of this statement, *amicus* cites wholly out of context statements in a paper which concluded not only that many of the leases at Navajo were some of the least favorable in the United States with respect to benefits to the lessor, but also that because the leases correspondingly contained high economic rents, they are an especially attractive potential tax base from a tax administration standpoint. See Williams and Cole, "Resource, Revenue and Rights Reclamation: A Tax and Sulphur Emissions Program for the Navajo Nation" (March, 1978).

upheld. To hold the Secretary responsible for reviewing all tribal tax ordinances regardless of the particular circumstances facing each tribe in its decision whether and how to enact and enforce a taxation program is not only inefficient and impractical, but also conflicts directly with the major thrust of five decades of federal policy concerning Indian self-government and political self-determination.

D. Petitioners Have Numerous Effective Remedies for Their Now Premature Complaints Regarding the Application and Enforcement of Tribal Taxes.

Petitioner and its *amici* devote literally pages of their briefs to a gratuitous—in light of its prematurity—description of the allegedly non-remediable parade of horrors which will befall non-Indian businesses and taxpayers if the tribal tax program is allowed to go forward. This tactic represents little more than a brazen and irrelevant attempt to convince the Court not as a matter of law but of policy that the Secretary must be held to a duty to supervise the lawmaking of tribal governments. The arguments are gross distortions of fact and serve only to emphasize the weakness of Petitioner's position.

Assuming, *arguendo*, that the Tribe has enforced its taxes with respect to Petitioner and its *amici*, numerous legislative, judicial and contractual remedies are available to both Indians and non-Indians who have complaints against the decisions of tribal governments. This Court, therefore, need not establish by implication the additional unprecedented and drastic remedy of mandatory federal supervision over all tribal lawmaking.

First, tribal governments are limited in their decision-making by the requirements of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03, which establishes rights to due process and equal protection that are directly analogous to those set forth in the federal Constitution. As this Court has stated previously, with respect to enforcement of the Act,

Tribal forums are available to vindicate rights created by ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. *Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. See, e.g., Fisher v. District Court*, 424 U.S. 382, 47 L.Ed.2d 106, 96 S. Ct. 943 (1976); *Williams v. Lee*, 358 U.S. 217, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959). See also *Ex Parte Crow Dog*, 109 U.S. 556, 27 L.Ed. 1030, 3 S. Ct. 396 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See *United States v. Mazurie*, 419 U.S. 544, 42 L. Ed.2d 706, 95 S. Ct. 710 (1975). [Emphasis added.]

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

In addition to tribal legislative and judicial forums, Petitioner and *amici* also have a federal judicial forum as evidenced by this and other federal court actions based on federal question jurisdiction where a tribe allegedly is without authority in particular cases to assert its power over non-Indian activities on the reservation. See *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2655 (1984); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983). Petitioner also may have a right of federal review of tribal taxes which allegedly infringe upon interstate commerce in violation of the Indian Commerce Clause or the Interstate Commerce Clause of the United States Constitution. *Merrion v. Jicarilla Apache Tribe*, *supra*.

Petitioner and *amici* also can avail themselves of a congressional remedy in light of Congress' plenary power over Indian tribes. See, generally, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886). Congress can act quickly

and decisively to confer mandatory Secretarial authority, as it has many times in the past, if it perceives problems in the exercise of tribal powers of taxation. Indeed, in light of that broad congressional authority over Indian affairs, this Court itself has observed that its role in adjusting relations between tribes and reservation residents correspondingly is restrained. *Santa Clara Pueblo v. Martinez*, *supra*. If Petitioner and its *amici* encounter the parade of horrors which they evidently anticipate, they should take their enforcement complaints to tribal and federal forums or to the Congress rather than ask the Court to depart so radically from its established principle of restraint by emasculating tribal sovereignty at the outset.

Finally, the tribes themselves have ample incentives to protect fully and fairly the property interests of non-Indians on their reservations. In accordance with current federal Indian and tribal policies, virtually every tribe is promoting greater private sector business activities on the reservations.⁹ Such efforts are particularly urgent in view of the substantial and continuing decline of federal employment opportunities on reservations.

Tribal economies, however, are capital-scarce and non-Indian investment and credit, therefore, typically are required to expand private sector business activities on the reservations. To attract such non-Indian businesses, tribes must ensure full protection of non-Indian interests. Indian tribes are doing so by successfully negotiating

⁹ Ironically, many attempts by tribes in the past to involve non-Indians in reservation development activities have been dismal. The lack of tribal business and legal expertise and commercial experience, and the failure of the United States as trustee to effectively assist tribes, resulted in commercial transactions to extract Indian resources under which the tribal royalty income is paltry in comparison to the take of the states through taxation and the benefit to non-Indian consumers in the form of low-cost electricity. See *Leased and Lost*, Council on Economic Priorities (New York, 1974).

complex contracts with non-Indians which contain, *inter alia*, waivers of the tribes' sovereign immunity from suit, tribal consent to federal court jurisdiction over disputes, and provisions for valuable tribal security to be held off-reservation on behalf of the non-Indian participants.¹⁰

As the foregoing reveals, Petitioner and its *amici* now have numerous effective legal, legislative and contractual remedies to protect fully their business interests on reservations. This Court, therefore, should not strain to find an additional remedy in the form of Secretarial review and approval of every law enacted by the over 500 tribal governments throughout the United States. Such pervasive federal involvement in tribal governments is not authorized by law, is inconsistent with federal Indian policy affirming tribal self-government on reservations and minimal federal intrusion into tribal decisionmaking, and would place enormous administrative burdens on the Secretary which he himself has sought explicitly to avoid. Accordingly, this Court should defer to Congress, as it has without exception in the past, to decide whether and how such comprehensive federal involvement in tribal government should occur.

¹⁰ *Amicus Curiae* Pueblo of Laguna, for example, recently entered into a multi-year contract with the Raytheon Corporation under which a Pueblo business corporation, with the vital assistance of Raytheon, will assemble and test communications equipment under a contract with the Department of the Army.

CONCLUSION

Petitioner asserts that "unorganized" Indian tribes have no power to tax non-Indians doing business on their reservations and that, even if such authority exists, the Secretary of the Interior must approve each exercise of the tribes' inherent power to tax. As has been demonstrated, Petitioner's thesis is contrary to repeated decisions of this Court upholding the exercise of tribal sovereign powers and finds no support in either existing laws or federal policy. The decision of the Court of Appeals sustaining the Navajo Tribe's tax ordinances without Secretarial approval should be affirmed.

Respectfully submitted,

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December 26, 1984

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ALEXANDER L. STEVAS,
CLERK

KERR-MCGEE, CORPORATION,
v. *Petitioner,*
THE NAVAJO TRIBE OF INDIANS, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF AMICI CURIAE THE SHOSHONE INDIAN
TRIBE AND ARAPAHOE INDIAN TRIBE OF THE WIND
RIVER RESERVATION, WYOMING, THE ASSINIBOINE
AND SIOUX TRIBES OF THE FORT PECK
RESERVATION, MONTANA, AND THE
PUEBLO DE ACOMA, NEW MEXICO
IN SUPPORT OF AFFIRMANCE**

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**BRIEF OF AMICI CURIAE THE SHOSHONE INDIAN
TRIBE AND ARAPAHOE INDIAN TRIBE OF THE WIND
RIVER RESERVATION, WYOMING, THE ASSINIBOINE
AND SIOUX TRIBES OF THE FORT PECK
RESERVATION, MONTANA, AND THE
PUEBLO DE ACOMA, NEW MEXICO**

INTEREST OF AMICI

The Shoshone Tribe and the Arapahoe Tribe, both of the Wind River Indian Reservation in Wyoming, are important Indian Tribes with governing bodies recognized by the Secretary of the Interior. Over 1,700,000 acres of land on the Reservation are held in trust for the Tribes or for their enrolled members, over 5,000 of whom live on the Reservation. The Tribes have never organized under § 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1982), nor have they incorporated under § 17 of that Act, 25 U.S.C. § 477 (1982). Neither tribe has a written Constitution. Both are governed by elected Business Councils of six members.

Many of the lands on the Wind River Reservation are leased for oil and gas development either by the Tribes or by individual tribal members. In 1978, in order to fund a tribal Minerals Department to oversee oil and gas leasing on the Reservation and for other purposes, the Shoshone and Arapahoe Tribes enacted an oil and gas severance tax.¹ The taxing ordinance was submitted to the Secretary of the Interior, who returned it to the

¹ In the fall of 1980, the Tribes discovered that lessees on the Reservation had for years been underreporting oil and gas production on the Reservation and, in some instances, had been taking oil and gas without reporting its production at all. These discoveries, in turn, led to intensive congressional and administrative investigation of oil and gas development on Indian lands throughout the country. Those investigations disclosed that because of "serious inadequacies in management," the federal government has been "failing to detect underpayment of oil and gas royalties." Report of the Commission, Fiscal Accountability of the Nation's Energy Resources 13 (1982).

Tribes with a letter stating his conclusion that the ordinance did not require secretarial approval.

Although the tribal severance tax was expected to be a major source of revenue for tribal departments and services,² since 1980 the tax has been tied up in litigation challenging the Tribes' authority to enact it. *Conoco, Inc. v. Shoshone and Arapahoe Tribes*, 569 F. Supp. 801 (D. Wyo. 1983), appeal docketed, Nos. 83-2243, 83-2255 (10th Cir. Oct. 5, 1983). That litigation presents issues substantially similar to those involved in this case.

The Assiniboine and Sioux Tribes of the Fort Peck Reservation in northeastern Montana are important Indian tribes with an elected governing body recognized by the Secretary of the Interior. About 917,000 acres of land on the Reservation are held in trust for the Tribes or tribal members. The Tribes have operated under a Constitution since 1927. They voted not to organize under 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (1982), and they have not incorporated under § 17 of that Act, 25 U.S.C. § 477 (1982). The Tribes' current written constitution, adopted in 1960, requires the Secretary of the Interior to approve of certain types of ordinances, including taxes affecting nonmembers of the Tribes. Constitution and Bylaws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Art. VII, Sec. 3 (1960).

Many of the lands on the Reservation are leased for oil and gas development. The Tribes enacted a minerals severance tax in 1980. The tax was subsequently approved by the Department of the Interior as required by the Tribal Constitution. An amendment, adopted in 1983, increasing the tax rate from 1% to 2%, was also approved by the Department. The Tribes are now collecting the tax from oil and gas lessees.

² Although the Tribes receive substantial revenues from mineral leases, by statute 85% of those revenues must be distributed *per capita* to tribal members. 25 U.S.C. § 613 (1982). Accordingly, they must resort to taxes to fund a large part of their operations.

The Pueblo de Acoma ("Acoma") is an important Indian Pueblo in New Mexico. The Acoma Tribal Council is the federally recognized governing body of the Pueblo. *E.g.*, Rev. Proc. 83-87, 1983-50 I.R.B. 9.

Acoma's traditional government system has continued fundamentally unchanged for centuries. While Acoma people voted to accept the Indian Reorganization Act pursuant to 25 U.S.C. § 478 (1982), the Pueblo has *not* adopted a written constitution or by-laws, preferring instead to continue "to organize for its common welfare" in the ancient forms which retain vitality to the present.

Approximately 3,000 Acoma Pueblo members live within the exterior boundaries of the Pueblo lands, which currently consist of approximately 250,000 acres. The lands are subject to numerous encumbrances, consisting of leases, rights-of-way, etc. Acoma has no oil and gas development leases.

The Acoma Tribal Council recently enacted a tax on non-retail commercial leaseholds. While the ordinance has been submitted for review and approval by the Secretary of the Interior or his delegate, Acoma has not conditioned the adoption of the ordinance or the collection of the tax on federal approval of any kind.

In addition to their concern that the decision in this case not call into question their tribal taxes, *amici* Tribes share with all Indian tribes a desire not to have this Court impose, as a matter of federal law, requirement that the Secretary of the Interior approve tribal ordinances of any kind, except where a tribal constitution or the procedures of the tribal governing body so require.

This brief is filed with the written consent of all parties to the litigation. The consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

Petitioner Kerr-McGee Corporation argues that Indian tribes not organized under the Indian Reorganization Act of 1934 ["the IRA"] cannot impose taxes on nonmem-

bers doing business on their reservations without the approval of the Secretary of the Interior; and that, in any event, tribes not both organized and incorporated under the IRA cannot impose taxes on oil and gas companies leasing tribal lands under the Mineral Leasing Act of 1938. Both arguments rest upon very substantial misunderstandings of the body of federal Indian law and the specific statutes relied on.

1. There is no reason in law or policy for this Court to impose on the Secretary of the Interior a duty that Congress has not imposed and that the Secretary does not want. Congress can limit the powers of tribal governments by, for example, requiring the tribal ordinances be approved by the Secretary of the Interior to be valid. On occasion, Congress has done so. Congress has neither directed nor authorized the Secretary of the Interior to review the tribal taxes at issue here. This Court should not insist that the Secretary do something Congress has not authorized him to do.³

Long before enactment of the IRA all three branches of the federal government had concluded that Indian tribes possessed the inherent authority to lay taxes on nonmembers residing or doing business on their reservations. Neither the executive, the legislative, nor the judicial branches had ever found that approval of such tribal taxes by a federal official was required in the absence of explicit treaty or statutory provisions commanding such review. The Indian Reorganization Act of 1934 in no way changed this aspect of existing law.

³ This is a particularly bad time to impose additional duties on the Secretary. Only two years ago, after extensive hearings, Congress found that the Secretary was already inadequately supervising royalty collections on Indian trust land, and that "it is essential" that his supervision of royalty payments be improved. Oil and Gas Royalty Management Act of 1982, § 2(a), 30 U.S.C.A. § 1701(a) (West, 1984). Imposing additional duties that Congress has *not* ordered will make it harder for the Secretary—in these days of increasingly stringent budgets—to carry out those duties that Congress has ordered and, indeed, found "essential".

2. The IRA was designed to *free* tribes from bureaucratic federal control, not to subject them to new requirements of executive approval. The IRA does not require any tribes to secure the Interior Department's approval of tribal ordinances. For tribes that reorganized under the Act, the only act of secretarial approval required by Congress was approval of the tribal constitution and bylaws. Tribal ordinances, by contrast, would require approval by the Secretary only if the tribal constitution or bylaws say so. Some IRA tribes have adopted constitutions requiring secretarial approval of taxing ordinances. Other IRA tribes have adopted constitutions authorizing taxation without secretarial approval, or (like *amicus* Pueblo de Acoma) have not adopted written constitutions at all.

The same is true for tribes that chose not to organize under the IRA. Some of the tribes that rejected the IRA (like *amici* Assiniboine and Sioux Tribes) have constitutions requiring secretarial approval of their ordinances, others do not. And since the IRA, both Congress and the Secretary of the Interior have fostered the development of self-government in all Indian tribes, irrespective of whether they reorganized under the IRA, or whether their ordinances require Interior Department approval.

3. The Indian Mineral Leasing Act of 1938 likewise does not limit tribal taxing powers. That Act was designed to bring order to the "patchwork" of federal statutes that then authorized some (but not all) kinds of mineral leasing of tribal trust lands on some (but not all) Indian reservations. The Act sought to increase tribal powers and revenues. It in no way decreased them, either expressly or by preemptively "occupying the field" to the exclusion of tribal taxing power.

4. Non-Indians doing business on Indian reservations do not need more "protection" from tribal taxation than Congress has seen fit to require. It is not insignificant that in the present case Kerr-McGee has shown no flaw

in the Navajo taxes except for the company's inherent corporate allergy to all forms of taxation. Of course, Kerr-McGee, a Delaware corporation, is not entitled to vote in Navajo elections. Neither is it entitled to vote in New Mexico elections—or for that matter in Delaware. (Its stockholders and employees, Indian or non-Indian, may vote in any elections for which they are qualified). But just as Congress has ample power to act if it believes that harsh state taxation of mineral resources is unfair to citizens or otherwise contrary to the national interest, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981) (30% state severance tax on coal), so Congress can act to supervise Indian tribal taxation of nonmembers.

Finally, this Court should not consider legislating a requirement of secretarial approval for tribal taxation of nonmembers. "Indians are not wards of Executive officers, but wards of the United States" *Ex parte Bi-A-Lil-Le*, 12 Ariz. 150, 151, 100 P. 450, 451 (1909). Oil and gas producers are certainly not powerless to obtain the ear of Congress. Congress can investigate, as it has in the past. This Court cannot. Congress can legislate, as it has in the past—with specific statutes tailored to deal with specific problems. This Court cannot. Absent direction from Congress, in the teeth of the longstanding (and present) position of the Secretary of the Interior, this Court should not deprive Indian tribal governments of literally millions of dollars of tax revenues upon which they have relied and which they desperately need.

ARGUMENT

I. CONGRESS, THE EXECUTIVE BRANCH, AND THE COURTS HAVE HISTORICALLY CONCLUDED THAT INDIAN TRIBES HAVE THE RIGHT TO TAX ACTIVITIES ON THEIR RESERVATIONS SUBJECT ONLY TO THE SUPERVENING AUTHORITY OF CONGRESS.

It is, of course, unquestioned that Congress has plenary power over Indian affairs. *E.g.*, *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 57 (1946); *Shoshone Tribe v. United States*, 299 U.S. 476, 496-498 (1937); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899). Since the earliest days of the Republic, for example, Congress has exercised this power by enacting statute after statute to prohibit any conveyance of Indian lands—such as by leasing—except with the approval of the Secretary of the Interior.⁴ The gov-

⁴ The early Indian Trade and Intercourse Acts (*e.g.*, Act of July 22, 1790, c. 33, § 4, 1 Stat. 137, the present successor to which is codified as 25 U.S.C. 177 (1982)) provided that:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

More recent statutes uniformly require the Secretary of the Interior's approval of transactions by Indian tribes relating to their lands, including rights-of-way, leases, timber sales, and mortgages to be granted by Indian tribes. *See, e.g.*, 25 U.S.C. § 311 (1982) (public highways), §§ 312-318a (railroad, telegraph, telephone line rights-of-way, and townsite stations), § 319 (telephone and telegraph rights-of-way), § 320 (railway reservoirs or materials), § 321 (pipeline rights-of-way), § 323 (rights-of-way for any purpose), §§ 396a-396g (leases for oil and gas mining and permits to prospect), § 399 (leases for mining purposes), § 407 (sale of dead and fallen timber), § 415 (leases of tribal land for public, religious, educational, recreational, residential, or business purposes), §§ 416-416j (leases on San Xavier and Salt River Reservations), §§ 641-

ernmental powers of Indian tribes are also subject to limitation by exercise of Congress's plenary power. Congress can prescribe the forms, or limit or expand the powers of tribal governments—as in the Indian Reorganization Act of 1934, discussed in Part II, *infra*. Congress can and sometimes has also required federal approval of tribal ordinances.⁶

In the absence of action by Congress limiting their governmental powers, however, Indian tribes are sovereign governments which exercise the “inherent powers of a limited sovereignty which has never been extinguished.” *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Id.* at 323. Tribal powers extend “both over their members and their territory.” *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Tribal governments police their reservations, operate judicial systems, regulate and distribute the use of tribal property, impose zoning, land use, and environmental controls, and generally act to provide the “advantages of a civilized society,” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138 (1982); *Commonwealth Edison Co. v. Montana*,

646 (authorizing Hopi tribal council to mortgage Hopi land for industrial park); §§ 2201-2108 (minerals agreements).

The purpose of the Secretary's approval power over property transactions, this Court has held, is generally to protect Indian tribes from improvident bargains with greedy or overreaching non-Indians. See, e.g., *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927); *In re Sanborn*, 148 U.S. 222, 227 (1893).

⁶ E.g., Act of November 2, 1966, 80 Stat. 1113, 25 U.S.C. § 416h (requiring approval of the Secretary of the Interior for zoning, building and sanitary regulations by the Papago and Salt-River Pima Maricopa Tribes); Act of June 28, 1898, § 29, 30 Stat. 495, 505, 512 (requiring federal approval for certain ordinances of Choctaw and Chickasaw tribal governments). See General Allotment Act of 1887, § 5, 25 U.S.C. § 348 (1982) (restricting tribal power to determine rules of inheritance for allotted lands).

453 U.S. 609, 627 (1981), to all those—Indian and non-Indian alike—who are on their reservations.

To finance these activities, like every other civilized government known to man, Indian tribes lay and collect taxes on persons and property within their jurisdiction. As this Court stated in *Merrion*, *supra* at 137, this “power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government,” a power that “enables a tribal government to raise revenues for its essential services” and “to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within [its] . . . jurisdiction.” It “simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers.” *Id.* at 138, n.5, quoting 617 F.2d at 550.

It is of course true that the powers of Indian tribes may be limited, in addition to limitations expressly imposed by Congress, by constraints that are implicit in tribes' status as domestic dependent sovereigns. E.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). But this Court has specifically held twice in this decade that tribes' power to tax nonmembers who do business on trust lands within an Indian Reservation is *not* so limited by virtue of tribes' dependent status or because the exercise of such a power would be contrary to the national interest. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, see especially at 144-147 and 145 n.11 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980). This is supported by a long line of decisions in each of the three branches of the Federal Government—Congress, the Executive Branch and the Judiciary—consistently recognizing the power of Indian tribes to tax persons and property within their reservations, subject only to such federal supervision as Congress has seen fit to specifically impose. This common understanding of the

three branches has applied to tribal taxes irrespective of federal approval of the ordinances involved.

In 1879, the Senate Judiciary Committee investigated an 1876 tax imposed by the Chickasaw Nation (*without* any federal approval), concluded that the tax was valid, and reported its conclusion to the Senate. S. Rep. No. 698, 45th Cong., 3d Sess. (1879).⁶ In 1898, apparently responding to particular concerns regarding the Choctaw and Chickasaw Tribes, Congress passed a statute providing specifically that certain acts of their legislatures (including taxes on nonmembers) would be valid only if specifically approved by the President. Act of June 28, 1898, § 29, 30 Stat. 495, 505, 512. Congress would not have passed such a statute had it thought that tribal taxes required federal approval in the *absence* of the explicit statutory restriction. And had Congress desired to limit the authority of *all* tribal legislatures to tax nonmembers on their reservations, it could easily have done so. It did not, and it never has.⁷

This is also the present—and the past—understanding of the Executive Branch. A Choctaw and Chickasaw tax on nonmembers on the reservation was ruled valid by the Attorney General in 1881, although (as noted above) it was a tribal act without approval by federal officials. 17 Op. Att’y Gen. 134 (1881). This opinion was reaffirmed three years later by a different Attorney General. 18 Op. Att’y Gen. 34 (1884). In 1900, yet a third Attorney General upheld the power of Indian tribes to tax non-Indians residing or doing business on their reserva-

⁶ In noting that the Chickasaw power to tax was “subject to the supervisory control of the Federal Government,” *id.*, at 2, the Senate Report was referring to the undoubted power of Congress to revise or otherwise control the tax. It had, after all, found the tax valid without any federal approval. Kerr-McGee, which apparently thinks that this Report supports its position, *see* Petitioner’s Brief at 23, simply misunderstands it.

⁷ Congress has, however, on occasion enacted laws requiring *specific tribes* to obtain federal approval of some or another of their ordinances. *See* Footnote 5, *supra*.

tions, even though some of the persons taxed were doing nothing more than residing on lands purchased under Acts of Congress. 23 Op. Att’y Gen. 214 (1900) (Five Civilized Tribes).⁸ These were not offhand opinions. The Choctaw and Chickasaw taxes were considered twice. And writing in 1900, Attorney General Griggs noted that “the question is . . . one of great magnitude and importance.” 23 Op. Att’y Gen. 214, 215.

This also has been the longstanding and consistent position of the Department of the Interior:

Chief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and nonmembers, so far as the nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1945);⁹ *see also* Memo. Sol. Int., Feb. 17, 1939, in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 873 (G.P.O., n.d.); F. Cohen, *Handbook of Federal Indian Law*, 266-267 (1942 ed.) (hereinafter “1942 Cohen”); *id.* at x (Solicitor Margold’s Introduction). The Department has never departed from that position. In the present case, for example, the Department refused to pass on the Navajo taxing ordinances on the ground that no such departmental approval was required. App. 66-71.

Nor is there any trace of a contrary judicial tradition. As this Court well knows, federal courts have consistently and authoritatively followed the lead of Congress and

⁸ Attorney General Griggs noted in 1900 that the taxes discussed in his opinion had been “approved by the President,” 23 Op. Att’y Gen. at 217, but he did not appear to regard the point as critical. Indeed, his opinion relies heavily on the previous opinions cited, even noting that their “rule applies to other [tribes]”. *Id.*, at 216.

⁹ The sole exception noted was federally-licensed traders operating under 25 U.S.C. §§ 261 and 262 (1982).

the executive branch and upheld tribal power to tax non-members residing or doing business on reservations for more than three quarters of a century. See *Rice v. Rehner*, — U.S. —, —, 77 L.Ed.2d 961, 971-72 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-152 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980) (one IRA tribe, two non-IRA tribes see 447 U.S. *supra* at 143, n.11); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Maxey v. Wright*, 3 Ind. T. 243, 54 S.W. 807 (Ct. App. Ind. Terr.), *affirmed*, 105 F. 1003 (8th Cir. 1900).

Thus, both before and after enactment of the Indian Reorganization Act of 1934, each branch of the federal government has expressed its considered opinion that Indian tribes have the power to tax nonmembers doing business on Indian reservations. Some of the tribal taxes involved had been approved by federal officials pursuant either to statutes or to tribal constitutions explicitly requiring such approval. Others had *not*, but they were held valid as well.

It follows that unless Congress has specifically divested tribes of taxing authority they still have it.¹⁰ In

¹⁰ Petitioner and *amici* cite a multitude of statutes where Congress has indeed specifically required federal approval of tribal actions. *E.g.*, Petitioner's Brief at 20-23; Brief of Salt River Project at 7. The vast majority of these enactments require federal approval of Indian property transactions, not governmental acts. Compare statutes in footnote 4, *supra*, with those in footnote 5, *supra*. In any event, far from establishing any brooding omnipresence of federal supervision, these statutes show beyond doubt that Congress has consistently legislated on the assumption that *specific* legislation is necessary to restrict either the proprietary or inherent sovereign powers of tribal governments. If the law were as petitioner would have it, Congress has been wasting its time passing unnecessary laws, and federal approval is intrinsically necessary for all tribal actions. But of course Congress has not been wasting its time. It has been legislating, as is its responsibility over Indian affairs, with care and precision.

the next two parts of this Brief, we refute petitioner's arguments that Congress in the Indian Reorganization Act of 1934 or Indian Mineral Leasing Act of 1938 retracted this taxing power from any tribes.

II. THE INDIAN REORGANIZATION ACT WAS INTENDED TO PROVIDE INDIANS WHO DESIRED TO DO SO WITH A MEANS OF REVITALIZING TRIBAL GOVERNMENT. IT WAS NOT DESIGNED TO FORCE INDIAN TRIBAL GOVERNMENTS INTO A SINGLE MOLD OR TO LIMIT TRIBAL TAXING POWER.

The Indian Reorganization Act of 1934, the centerpiece of the New Deal program for Indians, is one of the most important pieces of Indian legislation in American history.¹¹ It was reformist in nature, for it rejected the six decades of Indian policy that immediately preceded it.¹² For more than 60 years since 1871, federal Indian policy had been directed towards assimilating Indians into the mainstream of American life. To this end reservations were broken up and their lands allotted to individual Indians. The thrust of federal policy during this period was not to preserve or promote Indian tribal governments; it was to move individual Indians out of their tribes and into ordinary federal and state citizenship. See generally *F. Cohen, Handbook of Federal Indian Law*, 127-143 (1982 ed.). As a result of these policies, by

¹¹ In the view of Felix Cohen, the paramount scholar in Indian law (see *Squire v. Capoeman*, 351 U.S. 1, 8-9 and n.15 (1956)), this Act is "equalled in scope and significance only by the legislation of June 30, 1834, and the General Allotment Act of February 8, 1887." 1942 Cohen at 84. (Footnotes omitted).

The legislative history and objectives of the IRA are generally summarized in *Tribal Self-Government and the Indian Reorganization Act*, 70 Mich L. Rev. 955, 961-969 (1972).

¹² For example, the IRA was hailed by President Roosevelt as "embod[ying] the basic and broad principles of the administration for a new standard of dealing between the Federal Government and its Indian wards." Letter to Senator Burton K. Wheeler, April 28, 1934, S. Rep. No. 1080, 73d Cong., 2d Sess. 3 (1934).

the 1930s the institutions of many tribes had "very largely disintegrated or been openly suppressed" by excessive Interior Department control. 78 Cong. Rec. 11729 (1934) (remarks of Congressman Howard). And Indian landholdings had been drastically reduced. *E.g., id.* at 11726 (Remarks of Congressman Howard).

The 1934 Act was designed to remedy these problems. As President Roosevelt himself put it, "the continuance of autocratic rule, by a Federal Department, over the lives of more than 200,000 citizens of this Nation is incompatible with American ideals of liberty." Sen. Rep. No. 1080, 73d Cong., 2d Sess. 4 (1934). The remedy for this problem was to encourage tribal governments to organize and exercise powers of self-government and to curb federal bureaucratic control of reservations. A second evil, "the continued application of the allotment laws under which Indian wards have lost more than two-thirds of their reservation lands . . .," *id.*, was rectified by terminating the allotment process and taking various steps to arrest its effects.¹³

Petitioner argues that the 1934 Act—which was designed to reduce, not increase, federal bureaucratic control over tribes—somehow imposed a new executive supervision over tribal taxing authority which did not exist before 1934. After the IRA, they argue, only tribes that reorganized under the IRA and had their tax ordinances approved by the Secretary could tax. Such a result is absolutely inconsistent with the dominant purpose, the provisions and history of the Act.

As to tribes organized under the IRA, the only requirements of secretarial approval in the governmental provisions of the Act are that the Secretary approve the con-

¹³ These two dominant goals recur through the Act's legislative history. For example, Representative Howard stated on the House floor:

Land reform and a measure of home rule for the Indians are the essential and basic features of this bill. 78 Cong. Rec. 11729 (1934).

stitution and bylaws adopted by any tribe under it, Section 16, 25 U.S.C. § 476 (1982), and that he promulgate tribal charters requested under Section 17, 25 U.S.C. § 477 (1982). *The Act nowhere requires tribal ordinances to be approved by the Secretary.*

Moreover, the Secretary has approved constitutions under the Indian Reorganization Act with a broad variety of provisions regarding federal approval of tribal ordinances. As this Court observed in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66, n.22 (1978):

By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934, 25 U.S.C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, *though not that of the Santa Clara Pueblo*, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. (Emphasis added.)¹⁴

Kerr-McGee thus fundamentally misunderstands the Indian Reorganization Act when it argues that the Act commanded secretarial review of any class of Indian tribal ordinances.

As for tribes that elected not to reorganize their governmental structures under the IRA, there is likewise no

¹⁴ Many constitutions of IRA tribes allow tribal legislative bodies to enact taxes *without approval of the Secretary*. *E.g.*, Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin, Art. III, Sec. 1 (1977); Amended Constitution and Bylaws of the Pueblo of Laguna, New Mexico, Art. IV, Sec. 1(e)(4) (1958); Amended Constitution and Bylaws of the Hualapai Tribe of the Hualapai Reservation, Arizona, Art. VI, Sec. 1(m) (1956); Amended Constitution and Bylaws of the San Carlos Apache Tribe of Arizona, Art. V, Sec. 1(k) (1954); Constitution and Bylaws of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the State of Wisconsin, Art. VI, Sec. 1(j) (1936) as amended by Amendment XXVI (1978). All these constitutions were approved by the Secretary of the Interior in the year indicated in parenthesis.

basis in the language or legislative history of the Act as ultimately passed by Congress¹⁵ to suggest that it limited their powers to tax or imposed a new requirement of Secretarial approval of tax ordinances. Congress knew in 1934 that many tribal governments were still active, functioning entities.¹⁶ Such tribal governments were to be left "entirely undisturbed" by the Act unless a majority of the tribe involved desired otherwise. Letter from Commissioner Collier to Senator Royal S. Copeland, printed at 78 Cong. Rec. 11125 (1934); 25 U.S.C. § 478 (1982).¹⁷ Thus, Section 16 of the Act, 25 U.S.C. § 476

¹⁵ The bill as enacted was radically different from the Interior Department's original proposal (reprinted in *Hearing Before the Committee on Indian Affairs United States Senate on S. 2755*, 73d Cong., 2d Sess. 1-15 (1934)). The original proposal said nothing about preserving existing tribal governments and institutions. It gave Indians the choice whether or not to ask for a charter, but committed the form of the charter granted entirely to the Secretary's discretion. Section 2. And it maintained, quite explicitly, extensive Secretarial power over tribes organizing under the Act. See Sections 3-10. These provisions proposed by Interior were rejected by Congress. Under the IRA as enacted, tribal members were to elect whether to reorganize under the IRA. 25 U.S.C. § 478 (1982).

¹⁶ As Felix S. Cohen points out, Interior Department records show more than fifty tribal constitutions "or documents in the nature of constitutions" that had been adopted prior to the Indian Reorganization Act. 1942 Cohen at 129 n.59.

¹⁷ The sponsors of the bill were quite vehement in their insistence that the IRA was *not* to be forced upon any unwilling tribe or band of Indians. As noted, see footnote 15, *supra*, the Interior Department's original draft proposal for the IRA was mandatory on all tribes. This produced strong objections from tribes with functioning tribal governments. See, e.g., Senate Hearings, *supra*, at 53-54 (objections of Standing Rock Sioux, Blackfeet, Klamath, and Assiniboiné Tribes); 78 Cong. Rec. 11124 (1934) (objections of Yakima Tribe). On the floor of both the House and Senate, the optional nature of the bill as finally enacted was emphasized again and again. See, e.g., 78 Cong. Rec. 11123 (Committee "eliminated all compulsory provisions"), 11732; 12162 ("vast difference" between ultimate and original bill is that "everything in this bill is optional with the Indians"); 12165 ("there is nothing mandatory

(1982), expressly confirms existing tribal powers. See *Powers of Indian Tribes*, 55 Interior Dec. 14, 65-66 (1934) (among chief powers of law predating IRA is power to levy taxes on tribal members and "nonmembers residing or doing any business of any sort within the reservation"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (taxing power "very probably" confirmed by the Indian Reorganization Act).

In fact, many tribes that chose not to reorganize under the Indian Reorganization Act *have* adopted constitutions that do require approval of certain tribal ordinances by the Secretary of the Interior. *Amici* Assiniboiné and Sioux Tribes of the Fort Peck Reservation are one example. Article VII, section 3 of this tribal constitution empowers the Tribal Executive Board to:

To make and enforce ordinances covering the tribes' right to levy taxes and license fees on persons or organizations doing business on the reservation, except that ordinances or regulations affecting non-members trading or residing within the jurisdiction of the tribes shall be subject to the approval of the Secretary of the Interior.

Amici Tribes' oil and gas severance tax has accordingly been approved by the Secretary of the Interior.¹⁸

Petitioner and supporting *amici* appear to believe that federal Indian law divides tribes into two groups—those organized under the IRA and required to obtain Secre-

in this bill as reported"). Far from being a mold into which Congress wished to force Indian tribal governments, the IRA as enacted by Congress was intended simply as an *opportunity* that could be taken advantage of by those groups of Indians that either had no tribal governments or who were dissatisfied by their present form.

¹⁸ Similarly, the Colville and Lummi Tribes voted not to come within the Indian Reorganization Act, but Secretarial approval is required for their tribal taxing ordinances. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 143-144 and n.11 (1980).

tarial approval for their ordinances, and those not so organized and not required to obtain Secretarial approval for their ordinances. But as we have shown, there is no litmus test dividing tribes that have adopted constitutions under the Reorganization Act and those that have not. Some tribes in each category have required secretarial approval of tribal ordinances, and some in each category have not.

The nub of the matter is that by 1934, Indian tribes throughout the United States were in many different states of self-government. Many tribes—and particularly those that had already adopted constitutions—were functioning governments whose citizens were satisfied with them. Other tribes had lost their traditional forms of government and had nothing but the Bureau of Indian Affairs in their place. And still other Indians had lost their tribal identity entirely even though the Indians still lived on an Indian reservation. The Indian Reorganization Act dealt with tribes in all of these circumstances. Those satisfied with their present governments could continue unaffected by the 1934 Act. Those tribes dissatisfied with the form or powers of their government could reorganize under Section 16. And even those Indians no longer tied together as a tribe could, so long as they lived together on one reservation, obtain a tribal constitution under the Act.¹⁹ Congress in 1934 intended to provide Indians with a broader range of options than they had previously had. It did not intend to force any tribe or group of Indians into a particular mold.

Repeatedly since enactment of the IRA, Congress has acted to further its “overriding goal of encouraging

¹⁹ Although Section 16 of the IRA, 25 U.S.C. § 476 (1982), limits constitutions to “tribes,” Section 19 of the Act, 25 U.S.C. § 479 (1982), defines “tribe” as meaning “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” (emphasis added). Under the IRA, constitutions have been issued to groups of Indians not previously recognized as tribes. Memo. Sol. Int., April 15, 1936, reprinted in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, 813-814 (G.P.O., n.d.).

“tribal self-government and economic development” for all tribes. *New Mexico v. Mescalero Apache Tribe*, — U.S. —, —, 103 S. Ct. 2378, 2387 (1983), quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Congress has not distinguished in this legislation between tribes with IRA constitutions and tribes with constitutions not adopted under the IRA (or, indeed, without any tribal constitution at all).²⁰ See, e.g., the Royalty Management Act of 1982, 30 U.S.C.A. §§ 1732-1736 (West 1984) (authorizing delegation of Secretary’s oil and gas inspection and enforcement responsibilities to Indian tribes; no distinction between IRA and other tribes); Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* (1982); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1982); Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3320 (a), (c) (1) (1982) (allowing tribal taxes to be recovered under federal price regulations); Tribal Tax Status Act, 26 U.S.C.A. § 7871 (West 1984) (allowing deduction of tribal taxes for federal income tax purposes); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1982) (see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-66 (1978)). This Court should not legislate a distinction never imagined by Congress and never countenanced by the Department of the Interior.

III. THE INDIAN MINERAL LEASING ACT OF 1938 WAS INTENDED TO PROVIDE A UNIFORM SYSTEM OF MINERAL LEASING PROCEDURES FOR MOST (BUT NOT ALL) TRIBAL TRUST LANDS. IT WAS NOT INTENDED GENERALLY TO DEPRIVE INDIAN TRIBES OF THEIR RECOGNIZED TAXING POWER.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the then petitioners argued that the Jicarilla Tribe’s oil and gas severance tax was forbidden by the

²⁰ The single exception to this statement, 25 U.S.C. § 396b (1982), was enacted to preserve the specific power to lease tribal land, granted to tribes both organized and incorporated under the IRA. See footnote 25 below and the text accompanying it.

Indian Mineral Leasing Act of 1938, c. 198, 52 Stat. 347, *as codified*, 25 U.S.C. §§ 396a-396g (1982). This Court rejected the argument on the ground that, in any event, § 2 of the Act authorized "tribes organized and incorporated under § 16 and 17" of the Indian Reorganization Act "to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter" adopted pursuant to the Indian Reorganization Act. 455 U.S. at 150.

In the present case, petitioner argues the negative pregnant of the Court's holding in *Jicarilla*: that Congress, in enacting the 1938 Mineral Leasing Act, intended to deprive tribes *not* both organized and incorporated²¹ under the IRA of their existing powers to tax nonmembers holding oil and gas leases. This argument substantially misunderstands both the Indian Mineral Leasing Act and its relationship to the Indian Reorganization Act that Congress had enacted four years before.

Prior to the 1938 Act, a hatful of statutes governed the leasing of Indian tribal lands for mineral development. Section 12 of the Act of June 30, 1834, c. 161, 4 Stat. 730 (still in force as 25 U.S.C. § 177 (1982)) generally forbade the leasing of tribal lands except by treaty. The Act of March 3, 1871, 16 Stat. 566, codified as 25 U.S.C. § 71 (1982), forbade further treaties with Indian tribes and, for a while, thus blocked *all* potential mineral leasing. From 1875 to 1924, Congress passed a variety of special acts authorizing the leasing of lands on no less

²¹ Petitioner takes no note of the fact that under the IRA, organization and incorporation are separate matters. Section 16, 25 U.S.C. § 476 (1982), authorizes a "tribe or tribes [as defined in 25 U.S.C. § 479 (1982) to include tribes, bands, pueblos, or merely the Indians residing on one reservation], residing on the same reservation . . . to organize for its common welfare and . . . adopt an appropriate constitution and bylaws." Section 17, 25 U.S.C. § 477 (1982) authorizes Indian tribes to incorporate and authorizes incorporated tribes to exercise various powers, including the power to lease lands, but not "for a period exceeding ten years." Organization and incorporation under the IRA are separate acts, one governmental and the other proprietary in nature.

than eleven separate reservations. See 1942 Cohen at 327.

Beginning in 1891 Congress also began to legislate generally concerning leasing. Section 3 of the Act of February 28, 1891, 26 Stat. 795, authorized tribal councils to lease "bought and paid for" lands for mining purposes for up to 10 years with the consent of the Secretary. In 1924 the leasing period for oil and gas for most lands subject to that Act was extended to ten years "and as much longer as oil or gas shall be found in paying quantities." Act of May 29, 1924, 43 Stat. 244, *codified as* 25 U.S.C. § 398 (1982). These provisions were extended to cover Executive Order reservations in 1927. Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398a (1982). The Act of June 30, 1919, § 26, 41 Stat. 31, 25 U.S.C. 399 (1982) authorized *the Secretary* to lease tribal lands in nine named western states for metal mining, for periods of 20 years with a preferential right of renewal for additional 10-year periods. Yet another statute governed the leasing of agency or school lands. Act of April 17, 1926, 44 Stat. 300, 25 U.S.C. § 400a (1982). Finally, Section 16 of the Indian Reorganization Act granted organized tribes generally the power to *block* leasing of tribal lands, 25 U.S.C. § 476 (1982), and Section 17 allowed tribes which were *both* organized and incorporated to lease their lands (without secretarial approval) for not more than 10 years. 25 U.S.C. § 477 (1982).

The patchwork nature of existing law created a variety of problems, detailed by the Secretary of the Interior when he proposed the new law:

There is at present no law under which Executive order lands may be leased for mining, outside of [specified States], except for oil and gas . . . unless the tribes are hereafter qualified under . . . the Indian Reorganization Act

The act of June 30, 1919 . . . frequently results in long delay and is often quite an expense . . . con-

sequently the opportunity to lease the land is lost

[U]nallotted Indian lands within [specified States are on] the same basis for prospecting and leasing for metalliferous metals as lands of the public domain The Secretary of the Interior has no discretion . . . in the matter of granting a lease to an applicant . . . and in several instances it has been necessary to grant the lease, notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands

It is not believed that the present law is adequate to give the Indians the greatest return from their property

Letter from the Secretary of the Interior to the Speaker of the House of Representatives and the President of the Senate, June 17, 1937, reprinted in H. Rep. No. 1872, 75th Cong., 3d Sess. 1-2 (1938) and S. Rep. No. 985, 75th Cong., 3d Sess. 1-2 (1937).²²

²² There is very little recorded legislative history for the Act. It originated in a proposal from the Interior Department. On June 17, 1937, Charles West, Acting Secretary of the Interior, wrote identical letters to the Speaker of the House and the President of the Senate enclosing a proposed bill and urging its adoption. The proposed bill was forthwith introduced, without discussion, in the Senate, 81 Cong. Rec. 6016 (1937), and the House, 81 Cong. Rec. 8576 (1937). It was reported back with a recommendation of passage ("without amendment") by the House and Senate Committees. S. Rep. No. 985, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 7715 (1937); H.R. Rep. No. 1872, 75th Cong., 3rd Sess. (1938); 83 Cong. Rec. 2798 (1938). The committee reports reprint the Secretary's letter and say nothing more of substance. The bill passed both Houses without discussion. 81 Cong. Rec. 8399 (1937) (Senate); 83 Cong. Rec. 6057 (1938) (House).

There were predecessor Indian mineral leasing bills in the 73d Congress (S. 3565 and H.R. 9427) and in the 74th Congress (S. 2638 and H.R. 7681). Of these only S. 2638 was reported out of Committee; it passed the Senate and was not acted on by the House. The Committee report, S. Rep. No. 614, 74th Cong., 1st Sess., also reprinted a letter from the Secretary of the Interior, without elaboration.

The 1938 Act was designed to remedy these problems.²³ The major provisions are sections 1, 2, 4 and 5.²⁴ Section 1 authorizes tribal councils to lease unallotted lands for all kinds of mining purposes for periods of ten years "and so long thereafter as minerals are produced in paying quantities." 25 U.S.C. 396a (1982). Oil and gas leases are subject to mandatory competitive lease sales. 25 U.S.C. 396b (1982). As was its invariable habit when dealing with potentially indefinite alienation of tribal land interests, Congress required approval of the Secretary of the Interior for such leases.²⁵ 25 U.S.C. § 396a (1982). Section 2 requires the Secretary to lease lands by public auction, preserves his right to reject bids not in the best interests of the Indians, and saves the right, granted in § 17 of the Indian Reorganization Act, of organized and incorporated tribes to lease their lands for up to 10 years without either the public auction or the secretarial approval otherwise required under the Act.

²³ It was not, however, designed to deal with *all* mineral leasing even of tribal lands; the Act specifically exempts "the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, [and] the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma." § 6, *as amended*, 25 U.S.C. § 396f (1982). The excepted lands remained subject to special statutes. *E.g.*, Act of June 4, 1920, c. 224, § 6, 41 Stat. 753, *as amended by* Act of May 26, 1926, c. 403, 44 Stat. 658 (Crow Tribe). The exemption does not apply to Section 5 of the Act, which authorizes the Secretary to delegate his authority to approve leases to subordinates. And mineral leasing of *allotted* lands within a Reservation remain generally subject to the Act of March 3, 1909, c. 263, 35 Stat. 873, *as amended*, 25 U.S.C. § 396 (1982).

²⁴ Section 3 requires performance bonds of lessees; Section 6, as already noted, exempts certain lands; and Section 7 repealed all inconsistent acts. 25 U.S.C. §§ 396c, 396f (1982); 52 Stat. 348.

²⁵ Compare § 17 of the IRA, 25 U.S.C. § 477 (1982), which allows incorporated tribes to lease tribal lands for minerals for periods of up to ten years without secretarial approval and without competitive lease sales for oil and gas. This power was reaffirmed in § 2 of the Indian Mineral Leasing Act, 25 U.S.C. § 396b.

25 U.S.C. § 396b (1982). Section 4 subjects the lessee's "operations" under mineral leases to rules and regulations of the Secretary, and authorizes him to approve unit and communitization agreements. 25 U.S.C. § 396d (1982). And § 5 authorizes the Secretary to delegate his authority to approve leases to subordinates. 25 U.S.C. § 396e (1982).

Nowhere does the Act restrict the taxing powers of Indian tribes, whether or not organized under the Indian Reorganization Act.²⁶ Section 4 does provide that "[a]ll operations under any oil, gas, or other mineral lease . . . shall be subject to the rules and regulations promulgated by the Secretary of the Interior." 25 U.S.C. § 396d (1982). Under this provision the Secretary has issued extensive regulations governing (for oil and gas leases, for example) prospecting, drilling, diligent development, prevention of waste, royalty measurement, valuation, and collection, and other aspects of mining operations. 25 C.F.R. Part 211 (1983). These regulations, which are silent on taxation, apply to all tribes, including those organized under the Indian Reorganization Act.²⁷

²⁶ Section 2 of the Act, 25 U.S.C. § 396b (1982), does explicitly provide "That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under [the IRA], to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted pursuant to [the IRA]." This provision was necessary because the IRA explicitly granted tribes that were both organized and incorporated under its provisions the right to lease lands for mineral development for periods of up to ten years without Secretarial approval. Absent the proviso, the Indian Mineral Leasing Act (which in all cases requires the approval of the Secretary for leases) could have been read to withdraw this right.

²⁷ Title 25 C.F.R. § 211.29 authorizes tribes organized under the IRA (and some others) to modify the operating regulations of Part 211 either by their constitutions or by ordinances. Organized tribes, as noted above, see footnote 26, are authorized to lease lands for mineral purposes in some circumstances without the approval of the Secretary of the Interior. Section 211.29 thus assures that all mineral leases on such a reservation will be subject to the same operating regulations and avoids the administrative complexities that

But that the Secretary was *authorized* to regulate operations on mineral leases hardly implies that he was also *directed* to supervise Indian tribal taxation of minerals. The Secretary's regulations deal with proprietary aspects of the lease transactions, for which the Secretary has a fiduciary responsibility, not the tribes' governmental authority.²⁸ Moreover, the distinction between regulation and taxation is a familiar one both to Congress and this Court. *E.g.*, *Rice v. Rehner*, — U.S. —, —, 77 L.Ed.2d 961, 970-972 and n.7 (1983) (distinguishing between tribal taxing authority, a "fundamental attribute of sovereignty," and tribal authority to regulate); *cf.* *Bryan v. Itasca County*, 426 U.S. 373 (1976).²⁹

This Court has repeatedly held that statutes will be construed to abridge Indian rights only in the case of a "clear and plain" expression by Congress of its intention to do so. *United States ex rel. Hualapi Indians v. Santa Fe Pac. Railroad*, 314 U.S. 339, 353 (1941); *accord*, *Bryan v. Itasca County*, *supra*; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). There is no such expression here. Only four years before the Mineral Leasing Act, Congress had been scrupulous in gathering and deferring to the opinions of Indian tribal governments be-

would ensue if, on the same reservation, some leases were governed by tribal operating provisions and others by the rules imposed by Part 211.

²⁸ The Court in *Merrion* carefully distinguished between the Tribe's role as a property owner and its role as a sovereign, between actions that "sell the right to use the land and take from it valuable minerals" and "sovereign powers." 455 U.S. at 145-146. The Secretary's leasing regulations of course deal only with the former role, not the latter.

²⁹ Kerr-McGee also argues that the Navajo tax is invalid because it provides for forfeiture of the leasehold in case of nonpayment. Assuming *arguendo* that this aspect of the tax could be considered a regulation of mineral leasing, there is no reason for this Court to rule now on its validity. It may never be enforced; or, alternatively, should Kerr-McGee in the future refuse to pay the tax the Secretary might consider its failure to abide by the tribal ordinance a ground for exercising his own power of cancellation.

fore enacting legislation that would affect tribal powers. Yet Kerr-McGee argues that Congress in 1938 intended to deprive the seventy-seven tribes that had determined not to organize under the IRA³⁰ of a large part of their power to raise revenues—under the guise of a statute designed to help Indian tribes get “the greatest return from their property.” Congress may be subtle, but it is not malicious. When in the past it limited tribal taxing powers it did so explicitly. Had it intended to do so in 1938, it would have spoken clearly.

Nor is there substance to petitioner’s assertions that the Secretary’s trust supervision of Indian mineral leasing so occupies the field as to preempt tribal taxation of mineral operations. To be sure, this Court has on occasion held that *state* taxes on activities occurring on Indian lands have been preempted by federal law, as when the state taxes obstruct federal policies. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). But the inquiry is not simply whether federal law comprehensively regulates the activity in question. Rather, there must be “a particularized inquiry into the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). This inquiry takes place against the “backdrop” tradition of Indian sovereignty, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973), a tradition ordinarily hostile to state taxation of Indian activities occurring on Indian reservations. *Id.*; compare *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (upholding some state taxation of tribal activities *off* the reservation).

³⁰ [1940] *Report of the Secretary of the Interior* 364. As mentioned above, many of these tribes were governing under constitutions established long before the IRA was enacted, and Congress had no desire to force them within the strictures of that Act. See pp. 15-19, *supra*.

Given the background tradition of Indian sovereignty, Congress’s strong, continuing commitment to that tradition, and the canons of construction that ordinarily require Congress to be quite explicit before it will have been found to restrict tribal powers, *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Washington v. Fishing Vessel Association*, 443 U.S. 658, 690 (1979), it is questionable whether general federal regulation of matters occurring on Indian reservations should *ever* be held to preempt existing *tribal* authority, particularly in matters so crucial to a tribe’s basic existence as the power to tax. Certainly this Court has never held that it has. But in any event the calculus is evidently quite different when *tribal* authority, rather than *state* authority, is called into question.

Thus there is in this case no traditional canon of construction to counter the general principle that exemptions from taxation will not lightly be implied. Compare *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976) (Congress must show a “clear purpose” to restrict Indian tax immunities); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 175-176 (1973) (construing ambiguous language in favor of Indian tax exemption). It cannot be said that the tribal taxes would obstruct a federal policy of “assuring that the profits derived from . . . sales will inure to the benefit of the Tribe,” or otherwise diminish tribal revenues. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980). Tribal taxation of mineral resources can hardly be thought to infringe on tribal rights to “make their own laws and be ruled by them,” *Williams v. Lee*, 358 U.S. 217, 220 (1959). And the Navajo tribe here—and other tribes imposing similar taxes—provide substantial (indeed, critical) regulatory functions and services that benefit all people on the reservation. Compare *Bracker*, 448 U.S. at 148-149, 151 (state’s failure to identify services provided is a factor against the tax); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 156-157 (1980).

IV. NON-INDIANS DOING BUSINESS ON INDIAN RESERVATIONS DO NOT REQUIRE SPECIAL PROTECTIONS AGAINST TRIBAL TAXATION.

A constant descant to the arguments of Kerr-McGee and its supporting *amici* is that non-Indians doing business on Indian reservations somehow require special protections against the possibility of taxation by Indian tribes—specifically, that tribes should not be allowed to impose such taxes without the permission of the Secretary of the Interior. But one searches the briefs in vain to see why.

Tribal governments are not bands of hooligans out for plunder. They are the democratically elected representatives of a proud and free people, with a record of humanity and tolerance unmatched on this continent. The historical record—and the records of this Court—shows countless examples of white mistreatment of Indians, not the opposite. Indian tribes know very well the economic importance of non-Indian businesses on their reservations. There is no reason to believe they will attempt to drive those businesses away.

There is no reason in general to fear that Indian tribes will impose unduly harsh or demanding taxes on business activities on their reservations. It is not without significance that Kerr-McGee has pointed to nothing about the present taxes that suggests they are overreaching or unfair. Indeed, tribal taxes are typically set at a level far lower than comparable state taxes—and vastly lower than, for example, the 30% coal severance tax sustained by this Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).³¹

³¹ For example, the Shoshone and Arapahoe tribal severance tax is set at a rate of 4%; the State of Wyoming taxes oil and gas operations at a rate of more than 12%. See Wyo. Stat. § 39-6-302; Wyo. Stat. § 39-2-402; Wyo. Stat. § 30-5-116(b)(ii). The exact tax depends on the amount of the mill levies by county and local governments pursuant to Wyo. Stat. § 39-2-402. The Assiniboine and Sioux Tribes' severance tax is set at 2%. The Montana severance

To be sure, neither Kerr-McGee nor its supporting *amici* are entitled to vote in tribal elections. But neither are they entitled to vote in state elections. People vote. Corporations, whether "foreign" or "domestic," do not. However much corporations might desire such a result, they are not entitled to an immunity from taxation wherever they are not enfranchised.

Petitioner is not without recourse if it believes that its tax burden is too high. Like all other taxpayers, it may take its case to the tribal council. Invalidity of any tax can presumably be raised in any affirmative suit by a tribe to enforce payment of the tax.³² Tribal courts, moreover, which have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property issues of both Indians and non-Indians, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978), are open to petitioner to entertain challenges against a tribal tax.

Most important, petitioner and others like it are free at any time to attempt once again to persuade Congress to limit tribal governmental authority, by, for example, imposing a general executive supervision over the legislative activities of Indian tribes, or constricting the rate at which Indian tribes may tax non-Indian businesses.

tax is 2.61% (2.1% of the first \$6,000 of oil produced each quarter). Montana Code Annotated § 15-36-101. In addition, Montana imposes an oil and gas conservation tax of 0.2%, Montana Code Annotated Sec. 82-11-131, and a Resource Indemnity Trust Tax of 0.5%, Montana Code Annotated, § 15-38-104. Finally, Montana imposes a tax on the net production. Montana Code Annotated § 15-23-601.

³² The holding in *Santa Clara Pueblo* that the Indian Civil Rights Act does not create a cause of action enforceable in an affirmative suit in the District Courts was bottomed on notions of tribal immunity from suit. But courts have regularly found a waiver of sovereign immunity, limited to the scope of the complaint, when tribes have themselves initiated lawsuits in federal court. *E.g.*, *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979).

Congress could exercise its constitutional power to require that the executive approve all tribal tax ordinances, but Congress has never done so, although it has required executive approval for other tribal actions. If that step is to be taken, it rests with Congress to take it.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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17
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Office-Supreme Court, U.S.
F I L E D

DEC 28 1984

ALEXANDER L. STEVENS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

—○—
KERR-McGEE CORPORATION,
Petitioner,
versus

THE NAVAJO TRIBE OF INDIANS, *et al.,*
Respondents.

—○—
**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

—○—
RESPONDENTS' BRIEF

—○—
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QUESTION PRESENTED

Does federal law condition the effectiveness of tribal tax laws on an affirmative act of approval by the Secretary of the Interior, notwithstanding the Secretary's determination that no such approval is required?

PARTIES

Pursuant to Rule 40.3 of this Court and Rule 25(d) of the Federal Rules of Civil Procedure, the persons listed by Petitioner as the director and members of the Navajo Tax Commission are replaced as respondents herein by their successors, Lawrence White (director), Susan Williams, Stella Saunders, and Nelson Gorman (members), all of whom took office prior to the decision of the Court of Appeals. Although the Navajo Tribe appears in the caption of this case, it and the Navajo Tax Commission were dismissed as parties by the District Court on grounds of sovereign immunity, and the dismissal was not appealed. The action has proceeded as one against the tribal officers for injunctive relief by analogy to the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). N.M. Docket No. 14, Pet. Brief at 9.

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STATEMENT OF THE CASE

The Navajo Tribe of Indians is the largest Indian tribe in the nation, both in land base and population. The United States set apart a reservation for the Navajos by treaty in 1868 (15 Stat. 667), and the reservation has been repeatedly enlarged by executive order and statute. See J. Lee Correll & Alfred Dehiya, *Anatomy of the Navajo Indian Reservation* (rev.ed. 1976). Today the Tribe occupies an area of approximately 25,000 square miles (roughly the size of West Virginia), located within the States of Arizona, New Mexico, and Utah. *Id.* The vast majority of this land (including the land which Petitioner Kerr-McGee leases) is held in trust for the Tribe by the United States, although there is also fee land, including land owned in fee simple by the Tribe. *Id.*; See 25 U.S.C. § 635(b). The 1980 Census of the United States shows the population of the Reservation as 95.1% Navajo. The Bureau of Indian Affairs in 1981 estimated that 157,000 Navajos live on the Reservation and in its immediate environs.

The governing body of the Navajo Tribe is the Tribal Council, an 88-member body popularly elected every four years. 2 Nav.Tr.Code § 101 *et seq.*; 11 Nav.Tr.Code § 1 *et seq.* The Tribal Council has existed in much its present form since 1938, with a history extending back considerably earlier. There are about 79,000 registered tribal voters, and of these 69% voted in the last tribal general election in 1982. See 1982 Navajo Nation Official Returns, Navajo Election Commission.

Pursuant to its inherent sovereignty and in accordance with the Congressional policy expressed in the Indian

Self-Determination Act, 25 U.S.C. §450a (1975),¹ the Tribe operates a variety of governmental programs. These include a police force, a system of courts, natural resources management and protection agencies, a labor relations agency, health and social welfare programs, a system of public transportation, and an electrical, water, and sewerage utility. These governmental operations are financed in large part with the Tribe's own funds. See Navajo Tribal Council Resolution CS-45-84 (establishing 1985 tribal budget). It is not open to question that such programs are of general benefit to all of those living and doing business in Navajo Indian country.

Notwithstanding these tribal programs, however, the level of public services on the Reservation continues to fall far short of what is taken for granted in non-Indian communities. With neither federal nor state programs² filling many serious unmet needs, the tribal government must do so,³ and requires substantial additional revenues to that end. The inadequacy of the electrical distribution grid on the Reservation is such that the tribal utility estimates only 55% of reservation homes to have electricity. The ratio of paved roads to square miles on the reservation is one-third that in the rural areas of the States

¹i.e., for "an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."

²See F.Cohen, *Handbook of Federal Indian Law*, 646, 676 (1982).

³Note in this respect the declared policy of Congress "to help develop and utilize Indian resources, both physical and human, to a point where the Indians will exercise full responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. § 1451.

surrounding the reservation. United States Commission on Civil Rights, *The Navajo Nation: An American Colony* 21 (September 1975). Inadequate domestic sanitation and health care are reflected in a rate of various infectious diseases, some preventable by inoculation, up to fifty times higher than the national average. *Id.* at 118-119. The tribal police department is chronically understaffed and underpaid. See *Jurisdiction on Indian Reservations: Hearings on S. 1181, et al.*, Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. 247-296 (1980). The Tribe hopes by improving these conditions to attract new business to the Reservation, where the 1980 Census found 52,000 persons living below the poverty level.

The Tribe cannot reasonably hope to accomplish these goals, however, without exercising the prerogative of governments everywhere to raise revenues by taxing economic activities within their jurisdictions. The money which the tribal treasury has realized from reservation business ventures, including mineral operations, has in the past been limited to rents and royalties which the Tribe collects in its capacity as landowner. Revenues from the sale of public property do not provide a satisfactory base of support for a government, however, in part because lease terms are unlikely to offer the flexibility in response to changing economic circumstances which is the hallmark of taxation. Numerous mineral leases of Navajo land (including coal, oil, and gas, among others) extend "so long as the minerals are produced in paying quantities," with no adjustment of royalties.⁴ Bureau of Competition,

⁴As an example of the consequences, in 1974, with the average value of coal estimated at \$15/ton, the Navajo Tribe

(Continued on following page)

Federal Trade Commission, Staff Report on Mineral Leasing on Indian Lands, 34, 83 (1975). Lessees have therefore been able to profit from the rapidly increasing value of the goods and services they sell, in the meantime depleting non-renewable tribal resources, without bearing the parallel increases in the cost of providing government services to them.

In 1978, in order to meet the urgent need for additional governmental funds, the Tribal Council enacted two tax laws. The Possessory Interest Tax, 24 Nav.Tr.Code § 201 *et seq.*, Jt.App. 38 *et seq.*, is measured by the value of leasehold interests in tribal land, not including improvements. The tax rate has been set since 1978 at 3%. 24 Nav.Tr.Code § 201, Jt.App. 43 *et seq.* Because lease-

(Continued from previous page)

was still earning flat royalty rates on various coal leases, ranging from 15¢ to 37½¢/ton. Bureau of Competition, Federal Trade Commission, Staff Report on Mineral Leasing on Indian Lands, 30, 83 (1975). (This situation continues today, with federal surface coal royalties at a minimum of 12.5%. 30 U.S.C. § 207(a).) Power plants operated with Navajo coal have some of the lowest fuel costs in the nation. Compare the fuel cost of 64¢ per million btu's at the Four Corners Generating Station, a power plant operated by *amicus curiae* Arizona Public Service Company, with the national average for coal of \$1.64 per million btu's. Energy Information Administration, U.S. Department of Energy, *Cost and Quality of Fuels for Electric Utility Plants*, 100, 120 (1982 Annual). The states of Arizona, New Mexico, and Utah, through their own tax programs, are able in many instances to collect revenues from Navajo mineral producers at a significantly higher rate than does the Tribe. Among New Mexico's many taxes on mineral activities, for example, is a severance tax on coal at 57¢ per ton, substantially more than the Tribe receives under several of its leases. N.M. Stat. Anno. (1978) § 7-26-6. This, despite the fact that the Tribe bears the primary responsibility for governing the Reservation. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965).

hold appraisal techniques take into account not only the income from the use of the land but also the expenses required to produce that income, possessory interest taxes are considered to offer a high degree of tax equity both among mineral-producing properties and as between them and other types of properties. R. Paschall, "A Comparison of Minerals Tax Systems," 12 *Assessors Journal* 221-237 (December 1977).

The Business Activity Tax, 24 Nav.Tr.Code § 401 *et seq.*, Jt.App. 48 *et seq.*, is measured by receipts from the sale of personal property which has been produced or extracted within the Navajo Nation, and from the sale of services within the Navajo Nation. Property produced within the Navajo Nation and then removed before sale is valued as of the time it leaves the jurisdiction. 24 Nav.Tr.Code § 403(2), Jt.App. 53. A standard deduction and various expenses are subtracted to arrive at the net proceeds on which the tax is calculated. 24 Nav.Tr.Code § 406, Jt.App. 55-56. The tax rate has been set since 1978 at 5%. 24 Nav.Tr.Code § 401, Jt.App. 56.

Neither law distinguishes between businesses on the basis of whether or not they are Navajo-owned. 24 Nav.Tr.Code §§ 223, 416, Jt.App. 48, 57. Neither is limited to mining operations. Both laws permit appeals from assessments, first to the Navajo Tax Commission, and then to the Navajo Court of Appeals. 24 Nav.Tr.Code §§ 220, 427, Jt.App. 44-45, 60-61.

These two laws, like other Tribal Council resolutions, were submitted to the Bureau of Indian Affairs after passage, in order that they might be classified as to whether they required federal approval, and, if so, further acted upon. The Office of the Solicitor for the Department of

the Interior reviewed the Possessory Interest Tax (the first enacted), and expressly determined that it did not "purport to take any . . . action, which, under federal statute or regulation or under tribal law, is subject to Secretarial approval or disapproval." Memorandum of May 4, 1978; Jt.App. 71. Both taxes were thereafter classified by the Department of the Interior as not requiring Secretarial approval. The Secretary has neither approved nor disapproved either law, and has consistently maintained that the taxes do not require his approval in order to be valid.

Petitioner and others responded to the enactment of the tax laws by suing the Tribe. Petitioner did not seek any administrative review of the Secretary's determination, nor did it raise Secretarial approval as an issue in its original complaint. In 1980, however, after the decision of the Tenth Circuit in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, *aff'd* 455 U.S. 130 (1982), Petitioner amended its complaint to allege that the Navajo taxes required Secretarial approval. The United States was at that time named as a defendant, but never served with process.

In June 1982, it was decided in the parallel case of *Southland Royalty Co. v. Navajo Tribe*, No. 79-0140 (D. Utah), that the tribal taxes required Secretarial approval to be effective (although the plaintiffs' other challenges were rejected.). The district court in the instant case held the Tribe to be collaterally estopped by the *Southland* decision. Appeals and cross-appeals were taken to the Ninth and Tenth Circuits. On August 22, 1983, the Tenth Circuit held the taxes to be valid without Secretarial approval. *Southland Royalty Company v. Navajo Tribe*, 715 F.2d 486, *petition for rehearing pending*. On April 17, 1984, the Ninth Circuit reached the same conclusion. That

decision, upholding the Navajo taxes at issue,⁵ should be affirmed for the reasons set forth below.

SUMMARY OF ARGUMENT

The taxing power of the Navajo Tribe is an attribute of its retained sovereignty, not deriving from the federal government. As such, it is exercised by the Tribe and does not require affirmative federal action to effectuate it. There is nothing in federal law, including the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479, and the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g, which divests the Navajo taxing power, conditions its exercise on Secretarial approval, or distinguishes it from the taxing power of tribes with IRA constitutions.

The purpose of the Indian Reorganization Act was not to generate distinctions between tribes which did and did not wish to reorganize. It was for tribal rights of self-government to be fully exercised, and not thwarted by the federal bureaucracy as they had been in the past. Because there were many cases where prior federal policies had effectively destroyed tribal government, the IRA constitution was offered as a particular method of rebuild-

⁵On September 20 and October 24, 1984, the Navajo Tribal Council enacted amendments to the two tax laws. Navajo Tribal Council Resolutions CS-47-84 and CO-53-84. (Copies of the amended laws have been lodged with the Clerk.) The changes primarily concern the administration and enforcement of the taxes, and should have no effect on the amount of Petitioner's tax liability. None of the characteristics of the taxes described in the text, *supra*, or by the Ninth Circuit in its decision of this case, has been changed. The amendments did involve the rearrangement and renumbering of many provisions of the laws. Unless otherwise noted, references herein to the tax laws are to the pre-amendment Tribal Code section numbers (with page citations to the Joint Appendix).

ing tribal government. Its purpose was not to shape tribal government or make it more amenable to federal control. Tribes that adopted constitutions under the IRA were in no way required or even encouraged by the Act to condition effectiveness of their laws on approval of the Secretary of the Interior. Furthermore, recognizing that some tribal governments had successfully survived the allotment era, and that some tribes had no need or desire to reorganize under a federal statute, Congress deliberately allowed each tribe the choice of whether or not to accept the IRA. Existing sovereign powers were in no way diminished by any exercise of that option.

Far from being "unorganized," the Navajo Tribe has perhaps the most elaborate governmental organization of any Indian tribe. Its governing Council is elected by the Navajo people and has been repeatedly recognized by the political branches of the federal government, most recently pursuant to the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. §7871. The Tribe's governmental powers, and the power of the Navajo Tribal Council to exercise the Tribe's sovereignty, have also been specifically recognized by this Court. *United States v. Wheeler*, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959).

Whether a tribal ordinance requires Secretarial approval depends on the specific requirements of applicable federal and tribal law. The method by which a tribe organizes is not determinative. A tribe may adopt an IRA constitution that does not condition effectiveness of its laws on the Secretary's action, while a non-IRA tribe may require Secretarial approval through tribal law. In the absence of any provision of either tribal or federal law requiring approval, there is no basis for overturning the

determination of the Secretary that the Navajo tax laws do not require his approval. Congress has plenary power over Indian tribes, but to date it has seen no need either to divest or condition tribal taxing power.

The purpose of the Indian Mineral Leasing Act of 1938 was to enable Indian tribes to lease their lands for mining and to secure "the greatest return from their property." Its focus is on tribal property interests, and it makes no reference to taxation or other tribal governmental matters. Contrary to suggestions that the Act subordinated tribal mineral management to some overriding national scheme, fundamental decisions such as whether or not to lease were left to the tribes, with the Secretary participating only to the extent necessary to protect tribal property interests. The Act makes no relevant distinction between IRA and non-IRA tribes; the "proviso" relied on by Petitioner simply preserves to tribal business corporations chartered under the IRA a power expressly granted therein, to lease lands for not more than ten years, without the need for competitive bidding. Nothing in either the Act or the regulations issued thereunder is inconsistent with or limits the taxing power of the Navajo Tribe.

ARGUMENT

I. The Navajo Taxing Power, as an Attribute of the Tribe's Retained Sovereignty Which Does Not Derive from the Federal Government, May Be Exercised Without Secretarial Approval.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 139 (1982), this Court sustained the power of Indian tribes to impose taxes, within their territorial jurisdiction,

as an element of their inherent sovereignty. The Court held that "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." 455 U.S. at 137. As such it derives from a tribe's retained sovereignty and not from any federal grant of power. "Neither the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribe." 455 U.S. at 149, n.14.

Tribal taxing power, like other sovereign powers, remains intact unless divested by the federal government. This Court has declined to find divestiture of tribal powers in the absence of "clear indications" that Congress intended such a result. 455 U.S. at 149 & n.14, 152, 159. The Court in *Merrion* relied on the "widely held understanding within the federal government that federal law to date has not worked a divestiture of Indian taxing power." 455 U.S. at 150, quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980). See also *Montana v. United States*, 540 U.S. 544, 565 (1981); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Latta v. Oglala Sioux*, 259 F.2d 553 (8th Cir. 1958); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). The Court further rejected the suggestion that tribal taxation was inconsistent with overriding national interests. *Merrion*, 455 U.S. at 147, n.13, citing *Colville*, *supra*.

Holding that the Jicarilla Apache Tribe could "enforce its severance tax unless and until Congress divests this power," *Merrion*, 455 U.S. at 159, the Court admonished that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear

indications of legislative intent." 455 U.S. at 149, quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Any doubt about Congressional intent is to be resolved in favor of the tribe, as "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion*, 455 U.S. at 152, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980).

The Court has recently relied on the decision in *Merrion*, saying, "We have stressed that Congress' objective of furthering tribal self-government encompasses more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611, 621, 103 S.Ct. 2378 (1983).

Petitioner attempts to avoid the application of the rule of *Merrion* to the Navajo Tribe by focusing exclusively on the particular structure of the Jicarilla Apache tribal government. Because the Jicarilla taxes were approved by the Secretary of the Interior, Petitioner claims that no tribal tax law can be valid without such approval—and that not even the Secretary's own determination to the contrary will suffice. Petitioner ignores the fact that the need for Secretarial approval in *Merrion* arose from the provisions of tribal law. The Court plainly identified a specific article of the Jicarilla Constitution as the source of the requirement. 455 U.S. at 155. Navajo law contains no such provision.

The *Merrion* decision does not support the notion that federal law requires tribal taxes to be approved by the

Secretary in order to be effective. Such an argument is fundamentally inconsistent with *Merrion's* holding that the taxing power is an aspect of retained tribal sovereignty not deriving from the federal government. Tribal powers are exercised by the tribe. To condition every exercise of tribal taxing power on Secretarial approval would be to diminish tribal sovereignty. Congress could impose such a limitation, but it has never done so.

II. The Sovereign Powers of the Navajo Tribe Were Not Diminished by its Decision Not to Reorganize Under the Indian Reorganization Act.

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court reviewed Congressional policies towards Indians, including the encouragement in the Indian Reorganization Act of "stronger and more highly organized" tribal governments. It then said: "No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos." 358 U.S. at 220-221. There is no merit whatever to the suggestion that because the Navajo Tribe chose fifty years ago not to reorganize under the IRA, Congress disfavors its exercise of the powers of self-government.

The Indian Reorganization Act ("IRA"), 25 U.S.C. §§471-479, represented a repudiation of the policies effected by the General Allotment Act of 1887, 25 U.S.C. §331 *et seq.* The consequences of the allotment era, an almost devastating loss of land and autonomy by various Indian tribes, were described by the House sponsor of the IRA as "a scandal and a blot on our name in every part of the world." 78 Cong.Rec. 11727 (1934). Congress enacted the IRA to

remedy these past wrongs, and not to disable further any tribal government.

One of the specific evils of the allotment era was that federal policies had in many (though by no means all) cases "destroyed [the Indian's] own political and civic institutions," and brought on "the disintegration of his tribal and clan organizations." 78 Cong.Rec. 11729 (1934). Associated with the decline of many Indian governments was the ascendancy of the Bureau of Indian Affairs, exercising "almost unlimited" powers over "the property, the persons, the daily lives and affairs of the Indians." *Id.* Tribal monies were spent and tribal property disposed of without the consent of the Indians involved. 78 Cong.Rec. 11731 (1934).

In response to this situation, Congress in the IRA stated a federal policy in favor of tribal self-government.⁶ It provided that a tribe "shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws. . . ." 25 U.S.C. §476. As the use of the word "may" signifies, the adoption of a constitution in the manner authorized by the Act was never considered to be the only effective means of tribal organization. Congress specifically recognized that Indian tribes could, and had, organized outside the framework of any federal statute, it being said in the debates over the bill that some tribes, particularly in the western states, still retained a functioning government. 78 Cong.Rec. 11739 (1934). The Navajos had a Tribal Council prior to the enactment of the

⁶The IRA also addressed matters other than the reorganization of tribal governments, for example putting an end to allotment of tribal lands and offering financial benefits to tribes. 25 U.S.C. §§ 461, 469-471.

IRA, and were classified by the Interior Department as already having a "constitution or documents in the nature of a constitution." F. Cohen, *Handbook of Federal Indian Law*, 129 n.59 (1942). They were not therefore in need of the provisions of the IRA designed to allow the rebuilding of atrophied tribal governments.

Those tribes that did reorganize under the IRA did not acquire new sovereign powers. (Only a few specific powers, not here relevant, were enumerated in the Act.) The vast majority of powers which could be vested in a tribe or its council by an IRA constitution were simply described as "all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. §476. Felix Cohen in his classic treatise on Indian law said about the IRA that it "had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes," although "[u]ndoubtedly, the act had some effect upon the attitude of the administrative agencies towards powers which had been theoretically vested in Indian tribes but frequently ignored in practice." F. Cohen, *Handbook of Federal Indian Law*, 129-130 & n.62 (1942).

The decision of this Court in *Merrion* stands for the proposition that one of those powers which pre-existed the IRA, as opposed to having been created by tribal constitutions, is the taxing power. See also *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (involving tribes which had voted not to come under the IRA; see n.10, *infra*). Indeed, this was the understanding from the time the IRA was

⁷Even in the complete absence of the IRA the bureaucratic excesses Congress decried were no doubt in many cases unlawful. See *Powers of Indian Tribes*, 55 I.D. 14, 28 (1934).

enacted and the Solicitor of the Interior Department was asked to identify the powers under "existing law" referred to in the statute. *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934). The Navajo Tribe possessed the taxing power before the IRA became law, and it continues to possess it today.

Congress gave tribes the option of excluding themselves from the IRA⁸ specifically because of its respect for tribal rights of self-determination. It deliberately abandoned an earlier mandatory version of the Act, 78 Cong. Rec. 12164 (1934),⁹ and provided for elections to be held within a year (later extended to two), at which tribes could vote against its application to their reservations. 25 U.S.C. § 478. An amendment to the law in 1935 reaf-

⁸Although 25 U.S.C. § 478 speaks broadly of tribes voting against application of "this Act," it should be noted that various portions of the IRA have been held universally applicable, regardless of the outcome of local elections. See, e.g., *Mancari v. Morton*, 359 F.Supp. 585, 588 (D.N.M. 1973), *rev'd on other grounds*, 417 U.S. 535 (1974).

⁹The briefs of Petitioner and its supporting amici are replete with citations to the "legislative history" of the IRA which in fact had reference to earlier drafts of the law. See 78 Cong. Rec. 9269, 11738 (1934). This includes S.Rep. 1080, 73d Cong., 2d Sess. (May 10, 1934; Pet.Brief at 24); the remarks of Commissioner Collier on H.R. 7902 before the House Committee on Indian Affairs (February 22, 1934; Pet.Brief at 23); and the remarks of Commissioner Collier and others to the Navajo Tribal Council in March and April of 1934 (Pet. Brief at 27-29). The opposition of Indian tribes—particularly those which already had governmental organizations—to the original BIA-drafted bill which had been presented to them around the country led to extensive redrafting, to the end that "everything in this bill is optional with the Indians whereas in the original bill everything was mandatory." 78 Cong.Rec. 12164 (1934).

The BIA approach to tribal government that gave rise to the need for the IRA in the first place should also serve as a warning against taking on faith the assertions of individual BIA officials about how little power the tribes had and how much power they had.

firmed that all other laws and treaties of the United States continued in effect as to tribes voting against application of the Act. 25 U.S.C. § 478b.

Thus the purpose, the language, and the history of the IRA are all inimical to the suggestion that tribes which had managed to retain their political integrity through the allotment era, or indeed any tribes, risked diminishment of governmental powers if they chose not to reorganize under the Act. It was repeatedly stated during the debates on the Act that the bill would leave "altogether undisturbed" those tribes not wishing to come within it; and that tribes would be "unaffected by the bill if they choose not to be affected by it." 78 Cong.Rec. 11124.

The tribes which had the least need to reorganize under the IRA were precisely those, like the Navajo, which had best managed to retain their political integrity prior to its enactment. Contemporary reports indicate that a factor in the Navajo rejection of the IRA was the belief of tribal members that their 1868 treaty with the federal government already provided ample protection for their right of self-government. L. Kelly, *The Navajo Indians and Federal Indian Policy, 1930-1935*, 167, 169-170 (1970), citing the *Albuquerque Journal*, June 17, 1935, p.8 and June 24, 1935, p.6. In this belief they have been repeatedly proven correct. *E.g. McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959). (The Jicarilla Apaches, by contrast, did not have a treaty.) Other tribes rejecting the IRA did so on similar bases. J. Garry, "The Indian Reorganization Act and the Withdrawal Program," in *Indian Affairs and the Indian Reorganization Act: the Twenty Year Record* (W. Kelly, ed. 1954).

Contrary to Petitioner's assumption, there is nothing inherently "better"—or even different—about the governmental organizations of tribes accepting the IRA, such as would support a federal policy favoring the exercise of sovereign powers by those tribes. A tribe accepting the IRA was not required to adopt a written constitution at all, and many did not do so.¹⁰ *E.g.*, Zuni Tribe; see T. Haas, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* 18, 30 (1947) (hereinafter "*Ten Years Under IRA*"), G.Fay, ed., *Charters, Constitutions, and Bylaws of the Indian Tribes of North America* (1967), pt. IV p. 112 (hereinafter "IV Fay 112"). (Indeed, all that was required in order to "accept" the IRA was to fail effectively to opt out—for example, because no one showed up at the election or the tribe refused to hold one. *Ten Years Under IRA* 3, 14-15.) If a tribe did adopt a constitution, there was nothing in the IRA by which Congress required it or even encouraged it to condition its laws on Secretarial approval. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978) (recognizing Santa Clara constitution not to require Secretarial approval of ordinances). There are IRA constitutions specifically vesting in tribal organs the power to tax without any Secretarial approval requirement. Constitution of Pueblo of Laguna (1984 constitution expressly au-

¹⁰There are also many non-IRA tribes which have adopted written constitutions—either before or after the passage of the IRA. *Ten Years Under IRA* 34. This includes the Lummi and Colville Tribes, two of the tribes whose taxes were upheld in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 143 n.11, 152-154.

thorizing taxation of non-members; 1954 constitution, IV Fay 73, authorizing taxation without limitation to members); Constitution of San Carlos Apache Tribe, III Fay 36 (1954) (taxing power not limited to members). An IRA constitution need not specifically enumerate the powers vested in tribal organs at all. Constitution of Isleta Pueblo, V Fay 70 (1947). And nothing in the IRA required tribal constitutions to contain a bill of rights, to provide for separation of powers, or to organize the government into any particular form.¹¹

In a few instances the IRA enumerated powers that could be vested in tribal organs through IRA constitutions, and which were designed to discourage the kind of control the BIA had been exercising over various tribes. For example, a tribe adopting a constitution was expressly enabled to "prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 476. Yet even powers such as this last were not limited by Congress to IRA tribes. The IRA represented first and foremost a dramatic shift in federal policy, which the federal government has since pursued as to all tribes. Four years after the IRA, in the Indian Mineral Leasing Act of 1938, Congress confirmed in *all* tribes one of the specifically enumerated powers in the IRA, providing that

¹¹Congress has addressed individual rights vis-a-vis tribal government more recently in the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. (1968), which applies to all tribes, with or without IRA constitutions. The Navajo Tribal Council had previously adopted its own Bill of Rights. 1 Nav.Tr.Code § 1 et seq.

tribal lands could not be leased for mining purposes without the consent of a tribe.¹²

Subsequent legislation has reaffirmed Congressional support for tribal self-government in terms that do not distinguish between IRA and non-IRA tribes. Policy statements such as those in the Indian Self-Determination Act of 1975 and the Indian Financing Act of 1974 (see nn. 1 & 3, *supra*) apply to all tribes, without the slightest suggestion that Congress considers tribes which rejected the IRA permanently disabled from exercising powers of self-determination. (See also H.R.Rep. 91-78, 91st Cong., 1st Sess. (1969), documenting how an Interior Department proposal to treat IRA and non-IRA tribes differently with respect to the granting of rights-of-way was abandoned because of strong objections from a Congressional committee.) As the majority of Indians and the majority of Indian lands belong to tribes which did not accept the IRA, and as most federally-recognized Indian groups have not reorganized under any Act of Congress, the exclusion of

¹²In 1950, in the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 et seq., Congress further confirmed in the Navajo Tribal Council in particular not only the right mentioned in the IRA to *prevent* the disposition of tribal assets, but also the power to *determine* the use of tribal funds, subject to Secretarial approval. 25 U.S.C. § 637. Notwithstanding that the Navajo Tribe had not accepted the IRA, Congress in the Rehabilitation Act repeatedly recognized the authority of the Navajo Tribal Council over the Tribe's affairs. That Act again authorized the Navajo Tribe "to adopt a tribal constitution in the manner herein prescribed," but it did not require it to do so, and the legislative history indicates only a desire "to accord the Navajos the widest practicable choice in determining the framework of their tribal government." H.R.Rep. 81-1474, 81st Cong., 2d Sess. (1950). Like the IRA constitutions, this one might vest in the Navajo Tribe "any powers vested in the tribe or any organ thereof by existing law"—a clear indication that Congress did not consider the Tribe's existing powers to have been destroyed by its earlier decision not to reorganize under the IRA.

such tribes would leave an enormous gap in these policies. H.R.Rep. 91-78, 91st Cong., 1st Sess. at 3, 5 (1969).

The plain language of the IRA, as well as the intentions of Congress reflected in its legislative history and in more recent enactments, defeats any suggestion that a Tribe exercising the option offered it by Congress suffered diminishment of its governmental powers. The Navajo taxing power pre-existed the IRA and has remained intact until the present time, in no way limited by a law from whose application the Tribe excluded itself at the invitation of Congress.

III. The Navajo Tribe Is an Organized Tribe Whose Sovereign Powers Are Exercised Through Its Tribal Council.

Petitioner's contention that the Navajo Tribe is "unorganized" and that the Navajo Tribal Council therefore lacks the independent sovereign authority necessary to enact effective tax legislation is irreconcilable with both federal and tribal law, as reflected in the actions of all branches of the federal government and of the Navajo people.

In *Williams v. Lee*, 358 U.S. 217, 221-222 (1959) this Court considered the treaty of 1868 with the Navajos, and found implicit in it "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams*, significantly, concerned the activities of a non-Indian within the Navajo Reservation. The Court went on to say: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it." *Id.* at 223.

Congress has not taken this power away from the Navajo Tribe. The federal government has instead consistently recognized the Tribe's right to govern the reservation through the Navajo Tribal Council. In the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. §§ 7871(a) (3), Congress provided that taxes imposed by Indian tribal governments might, like state taxes, be deducted for federal income tax purposes. Congress directed the Internal Revenue Service, in consultation with the Interior Department, to develop a list of Indian tribal governments eligible under the Act. The list includes the Navajo Tribal Council. Rev. Proc. 83-87, Dec. 12, 1983, 1983-50 I.R.B. 8. Also recognizing the power of the Navajo Tribal Council in particular to levy taxes is 25 C.F.R. § 141.11.

These are two of many expressions of federal recognition of the Navajo Tribal Council as the government of the Navajo Tribe. See Department of the Interior, *Governing Bodies of Federally Recognized Indian Groups* 14 (1975). In providing for Navajo participation in various decisions or actions, Congress has often specified the Council as the body through which that participation will occur. 25 U.S.C. §§ 635(b), 637, 638; 16 U.S.C. § 445; Pub. L. 93-351, Act of Dec. 22, 1974, 88 Stat. 1712; Pub. L. 93-493, Act of October 27, 1974, 88 Stat. 1486; Pub. L. 85-868, Act of Sept. 2, 1958, 72 Stat. 1686-1690. See also S.Rep. 93-1177, 93rd Cong., 2d Sess. at 12 (1974).

Petitioner is alone in its belief that the Navajo Tribe is "unorganized." The Navajos have been said to have "perhaps the most elaborate governmental organization"

among tribes. H.R.Rep. 91-78, 91st Cong., 1st Sess. 8 (1969). And the Secretary has been at some pains to point out that the term "unorganized" is only "applied to groups which are without any form of organization recognized by this Department We recognize many tribal organizations established outside of the provisions of [the Indian Reorganization Act and the Oklahoma Indian Welfare Act]." *Id.* at 40. The Navajo Tribal Council is one of these. *Id.* at 48.

Petitioner now suggests that the involvement of the Secretary of the Interior in the organization of the Navajo Tribal Council somehow limited the Council's ability to exercise the Tribe's sovereign powers. Petitioner has not previously made this argument, having obtained its leases from the Navajo Tribal Council, and stated in its complaint in this case that the Council was "the governing body of the Tribe." First Amended Complaint ¶ 4, Jt. App. at 6. The argument also contradicts Petitioner's claim that the involvement of the federal government in the organization of IRA tribes particularly favors *their* exercise of the taxing power.

Petitioner errs in assuming that because the federal government was involved in establishing the *procedural* mechanisms by which the members of the Navajo Tribe elect their representatives, the *substantive* powers of the Council derive from the federal government as well. Although the Secretary did facilitate the organization of the Tribal Council through procedural regulations, he never purported to dictate or even to enumerate the Council's substantive powers. The 1938 "Rules for the Navajo Tribal Council" simply specified that "The Tribal Council shall be the governing body of the Tribe," and that resolutions of

the Council should be signed or countersigned by the Chairman or Vice-Chairman of the Council, with no mention of approval by the Secretary. Rules for the Navajo Tribal Council, Ch. 1, § 1, Ch. VI § 6, reproduced in R. Young, *The Navajo Yearbook* 407-411 (1961).¹³

An approach very similar to Petitioner's was expressly rejected by this Court in *United States v. Wheeler*, 435 U.S. 313, 328 (1978), when it said "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power." The *Wheeler* case is of particular interest here, because the Court specifically recognized that the Tribal Code and the tribal courts created by the Navajo Tribal Council are manifestations of the separate and original sovereignty of the Navajo Tribe, and not that of the United States. *Id.* at 327 & n. 5. The argument that the Navajo Tribal Council derives its powers from the Secretary would require reversal of this Court's holding in *Wheeler* that prosecution in federal and Navajo courts did not constitute forbidden double jeopardy. See also *Williams v. Lee*, *supra*; *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963).

The Navajo Tribal Council derives its powers from the Navajo people who go to the polls every four years to elect

¹³These regulations were a product of meetings of Interior Department officials with the "constitutional assembly" referred to in the resolution which is Exhibit A to Petitioner's Brief. See 1954 Navajo Tribal Council Resolutions at 190; R. Young, *The Navajo Yearbook* 381-382 (1961); S.Rep. 93-1177, 93d Cong., 2d Sess. (1974). As since amended, they are part of the Navajo Tribal Code. 2 Nav.Tr.Code § 101 et seq.; 11 Nav.Tr.Code § 1 et seq. This may be considered the organic or "constitutional" law of the Tribe in the sense of "the written organizational framework of any tribe for the exercise of governmental powers." 25 C.F.R. § 82.1(e). See T. Haas, *United States Indian Service, Ten Years of Tribal Government Under IRA* 34 (1947).

"the governing body of the Tribe." *The Navajo Yearbook* at 386, 407; M. Shepardson, "Navajo Ways in Government: A Study in Political Process," 65 *American Anthropologist*, No. 3, Part 2, at 63, 106 *et seq.* (June 1963). It has never been the case that any people (not to mention one whose native language is unwritten) may establish a government only by voting to adopt a written constitution. See *Iron Crow v. Oglala Sioux*, 231 F.2d 89, 92 (8th Cir. 1956). Nor is there anything remarkable about the fact that the scope of matters as to which the Council has legislated has broadened over the years. The Navajo Tribe has been encouraged in precisely that direction by the federal government over the past half-century. "Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts." *Williams v. Lee*, 358 U.S. 217, 221 (1959). Whereas the Tribe was once served by federal police, federal courts, and federal schools, it now has tribal police, tribal courts, and even tribal schools—all of which necessitates Council action of a different kind than what was called for in the 1930's. Without tax revenues, however, this trend cannot long continue.

It has been said that "the first element of sovereignty" is "the power of the tribe to determine and define its own form of government." Powers of Indian Tribes, 55 I.D. 14, 30 (1934); F.Cohen, *Federal Indian Law* 126 (1942). The legitimacy of the Navajo Tribal Council being recognized both by the Navajo people and by the United States, it is not at all clear what justiciable question of federal law Petitioner believes its organizational history to present. See *United States v. Holliday*, 70 U.S. 407, 419 (1866). The manner in which the Navajo Tribe

vested its powers in the Navajo Tribal Council could not possibly alter the fact that *federal* law has never divested the Tribe of its taxing power nor conditioned its exercise on Secretarial approval.

IV. There Is No Law Requiring Secretarial Approval of The Navajo Taxes.

Whether a tribal ordinance requires Secretarial approval is determined by the specific requirements of applicable federal and tribal law. In contending that all tribal tax laws require Secretarial approval, Petitioner is arguing for a limitation on tribal sovereignty which Congress has never imposed and which the Secretary himself has rejected. Petitioner apparently believes this approval requirement derives from the Indian Reorganization Act, proceeding on the assumption that if a tribe adopts an IRA constitution its laws require Secretarial approval. This is incorrect. As noted above, pp. 17-18, there is nothing in the IRA requiring tribal constitutions to condition tribal ordinances on Secretarial approval. There are IRA constitutions vesting powers, including the power to tax non-Indians, in tribal organs, without any such requirement. *Id.*

Whether a tribe with an IRA constitution does or does not condition its powers on Secretarial approval is thus a question of *tribal* law. Similarly, a tribe without an IRA constitution may condition its taxes or other laws on Secretarial approval by including such a requirement in the ordinance in question or other tribal law. But neither the IRA nor any other *federal* law conditions tribal taxing power on Secretarial approval.

There are, of course, certain kinds of tribal actions which Congress *has* expressly required to be approved by

the Secretary. This is almost always the case where a tribe is disposing of or conveying tribal property interests. See e.g. 25 U.S.C. §§ 177, 323, 635. Petitioner's continual citation of such statutes and of the cases enforcing them, however, serves only to point up the fact that there is no general rule requiring Secretarial approval of all tribal actions, and that when Congress has intended such a requirement it has said so. "Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." *Alco Steamship Company v. Federal Maritime Commission*, 348 F.2d 756, 758 (D.C.Cir. 1965).

When Congress inquired into civil rights in Indian country, an inquiry culminating in the passage of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1968), the investigating committee reported that it "had failed to uncover any Federal statute which specifically requires Secretarial approval of tribal ordinances." Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S.Res. 265, 88th Cong., 2d Sess., at 3 (1964). The subcommittee further found that broad approval requirements in tribal constitutions "frustrate responsible self-government." *Id.* If Congress had believed Secretarial approval to be necessary in order to ensure the rights of those within Indian country, it obviously could have legislated to that effect in the Civil Rights Act. It did not take that course.

Nor did this Court's opinion in *Merrion* indicate the existence of any federal approval requirement for tribal tax laws. The Court specifically identified the constitu-

tion of the Jicarilla Apache Tribe as the source of the requirement for Secretarial approval.¹⁴ 455 U.S. at 155. Although Secretarial approval may be *one* of the factors which can "minimize potential concerns" about unprincipled tribal taxes, 455 U.S. at 155, it is not the only one identified by the Court. Congress retains the ability to limit the taxing power of *any* tribe, the Navajos included. The Tribe is also constrained by its own economic self-interest and by the involvement of the Secretary in numerous other aspects of Navajo government (for example, in approving the expenditure of tribal funds, and in determining in the first instance whether a tribal action does or does not require his approval).

The Secretary's own long-standing position is that there is no general requirement for approval of tribal ordinances, but only specific requirements arising out of federal law, the tribal constitution, or other tribal law. In 1959 the Assistant Solicitor determined Navajo Tribal Council resolutions concerning labor policy not to require Secretarial approval, saying:

It has been emphasized that "Indians are not wards of the Executive officers, but wards of the

¹⁴The language Petitioner quotes from *Merrion* about federal "checkpoints" is part of this Court's analysis of the Commerce Clause issue there. 455 U.S. at 145. The existence of such checkpoints was relevant because it obviated the need for additional analysis by the Court under the dormant Commerce Clause. *Id.* The absence of federal checkpoints might have altered the Commerce Clause analysis (although this Court went on to hold that the tax at issue would not infringe the dormant Commerce Clause in any case), but that provides no support for the argument that, independent of any Commerce Clause question, a tribal tax must pass through federal checkpoints to be valid. Here there is no Commerce Clause issue presented.

United States." [Citations omitted.] Congress has not required the Secretary to approve tribal ordinances, nor has the President or the Secretary, under authority delegated by Section 2 of 25 U.S.C., seen fit to issue regulations referring to Secretarial consideration or approval of tribal ordinances.

Memorandum, June 6, 1959, Jt.App. at 67. The Bureau of Indian Affairs Manual takes a consistent position. It states that tribal ordinances are adopted by the vote of tribal governing bodies, that they do not require Secretarial approval except when federal or tribal law so provides, and that "Such action should be minimal in view of the policy of self-determination." 83 B.I.A. Manual 6.6B.

The Secretary has recently issued "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities." January, 1983. See Appendix to this Brief. One purpose of these guidelines is "to assist Indian tribes in the exercise of their inherent authority to tax mineral activities within their jurisdiction." Guidelines, §1.1(A) (2). The guidelines recognize the power of tribes both with and without written constitutions to tax, so long as the constitution or other documents creating a tribal governing body do not limit it to enumerated powers not including taxation, or otherwise specifically preclude taxation. §1.6(b) (2). The *only* substantive reasons for which taxes subject to the guidelines may be disapproved are violations of federal or tribal law, or failure to provide for a hearing on contested taxes. §1.6B. The Navajo taxes meet the standards of these guidelines. 24 Nav.Tr.Code §§220, 427, Jt.App. 44-45, 60-61. The guidelines do not however apply of their own force to the Nava-

jo taxes, because the Secretary has limited their scope, consistent with his position in this litigation, to cases "where Secretarial review or approval is expressly required under federal law, the constitution of the tribe, the ordinance itself, or other tribal law." §1.1B. As noted previously, the Navajo tax laws were submitted to the Interior Department in 1978, and specifically determined by it not to require approval.

There is no single law determining which tribal ordinances require Secretarial approval. The matter is determined by the Secretary in light of the laws applicable to each particular case. It would create enormous practical difficulties in governance if the determination of a tribe's own trustee that a tribal action does not require approval were liable to be overturned years later at the instance of a non-party to the trust relationship. It would also be inconsistent with the deference normally due to an agency's own interpretation of the duties committed to it by law. *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The courts have previously respected the Secretary's determination as to where tribal action does and does not require his approval. *Babbitt Ford v. Navajo Tribe*, 710 F.2d 587 (9th Cir. 1984), *cert. denied* — U.S. —, 104 S.Ct. 1707 (1984) (Navajo ordinance regulating repossession of personal property on reservation held not to require Secretarial approval); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (tribal zon-

ing ordinance held not to require Secretarial approval); *Cenoco v. Shoshone & Arapahoe Tribes*, 569 F.Supp. 801 (D. Mont. 1983), *appeal pending* (10th Cir.) (decision same as Ninth and Tenth Circuit holdings in instant case); *State v. District Court*, 609 P.2d 290 (Mont. 1980). *Cf. Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), *cert. denied* — U.S. —, 78 L.Ed.2d 723 (1983) (tribe held unable to terminate lease without Secretarial approval *because* of existence of applicable regulations on the subject and position of Secretary that his approval was required; Petitioner's reliance on this case is therefore misplaced).

Neither the Navajo Tribe nor any other tribe is outside of federal control. Congress has ample power to deal with any threat particular tribal taxes might pose to national interests. Petitioner, however, continually confuses the existence of federal *power* over Indian tribes with a requirement that such power must be exercised in every case to effectuate tribal action. To insist on Secretarial approval in the circumstances of this case, particularly when the Secretary himself has determined it to be unnecessary, is to insist on a great deal more than federal oversight of tribal action. It is instead to take the position that the exercise of the tribal taxing power somehow requires an affirmative exercise of federal as well as tribal sovereignty. This is inconsistent with what has been described as "perhaps the most basic principle of Indian law," and recognized by this Court in numerous cases including *Merrion*: "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent

powers of a limited sovereignty which has never been extinguished." Felix Cohen, *Handbook of Federal Indian Law* 122 (1942). See also *United States v. Wheeler*, *supra*; *Williams v. Lee*, *supra*.

V. The Indian Mineral Leasing Act of 1938 Does Not Divest or Limit the Taxing Power of Indian Tribes.

A. The Indian Mineral Leasing Act does not distinguish in any relevant way between IRA and non-IRA tribes.

In *Merrion* this Court rejected arguments that the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§396a-396g, divested the taxing power of the Jicarilla Apache Tribe. *Id.* Now Petitioner suggests that this same Act, which contains no reference to taxation, *does* limit the taxing power of the Navajo Tribe. It attempts to reconcile this argument with *Merrion* by claiming that the Act *distinguishes* between the taxing power of IRA and non-IRA tribes. This argument, allegedly based on the "proviso" in Section 2 of the 1938 Act (25 U.S.C. §396b), is wholly untenable on the face of the Act.¹⁵ The holding in *Merrion* that the 1938 Act did not divest tribal taxing power therefore applies to the Navajos as well as to the Jicarillas.

¹⁵Section 1 of the 1938 Act (25 U.S.C. § 396a) provides that tribal lands may be leased, by authority of the tribal council or other tribal spokesman, and with the approval of the Secretary, for ten years and so long thereafter as minerals are produced in paying quantities. Section 2 (25 U.S.C. § 396b) sets out the procedures whereby leases shall be offered for sale, with the involvement of the Secretary in various respects, and includes the proviso relied on by Petitioner:

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The portion of the 1938 Act from which Petitioner claims the diminishment of taxing power arises is Section 4 (25 U.S.C. §396d), which authorizes Secretarial regulation of lease operations. Petitioner's attempt to distinguish two classes of tribes is completely undermined, however, by the fact that Section 4 makes no distinction between IRA and non-IRA tribes. It *expressly* applies not only to leases made under the 1938 Act, but also to leases made pursuant to the terms of *any other Act affecting restricted Indian lands*. Leases made pursuant to a tribe's IRA constitution and charter, therefore, are covered by the Secretary's authority in Section 4 to regulate operations under leases once made. Petitioner's claim that Section 4 precludes tribal taxation, but that IRA tribes are excluded from its coverage, fails.

What the proviso in Section 2 refers to is something else entirely. It provides that the "foregoing"—namely the provisions for Secretarial involvement and competitive bidding in the *making* of a lease—shall not restrict the

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Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease land for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

(Emphasis added.)

Section 4 of the Act (25 U.S.C. § 396d) provides in relevant part:

That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

(Emphasis added.)

rights of tribes both organized *and* incorporated under §§ 16 and 17 of the IRA (25 U.S.C. §§ 476 and 477) to *lease* lands as therein provided.

The focus of the proviso is not on whether a tribe has adopted a constitutional form of government under § 16, but on whether it has further opted to create a business corporation to manage tribal property under § 17. (One does not necessarily follow from the other. 25 U.S.C. §§ 476, 377; T. Haas, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.*, 1947.) Nor does the proviso purport to create any *new* rights in such tribal corporations; it preserves only the right to lease land for mining purposes *as provided in* Sections 16 and 17 of the IRA.

Section 16 of the IRA mentions the right to *prevent* disposition of tribal land—a right extended to all tribes with respect to mineral leases in the 1938 Act. Section 17, however, provides that a corporation chartered under that section may be empowered to lease tribal lands, but that "no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation."

This, then, is the power reserved to tribal corporations by the proviso in the 1938 Act: the power to lease tribal lands for *not more than ten years*, without the Secretarial involvement and competitive bidding procedures provided for in Section 2 of the Act. In this manner IRA corporations are enabled to function like other businesses to the extent of making limited leases of land, without the Secretary's participation in the *grant* of lease which would otherwise be required by the 1938 Act.

Once a lease is made, however, the authority of the Secretary to regulate operations under Section 4 applies

to *all* tribes equally. Furthermore, as authorized by the 1938 Act, most mineral leases extend beyond ten years, for "so long as the minerals are produced in paying quantities." The IRA gives *no* tribe the power to enter into long-term leases of this sort without Secretarial involvement. As a result, with respect to the bulk of mineral leases, IRA and non-IRA tribes are in exactly the same position even with respect to the requirements of Section 2. The leases at issue in *Merrion* were for longer than ten years, and the Court specifically noted that they were approved by the Secretary, as required by the 1938 Act. 455 U.S. at 135.

The legislative history of the 1938 Act also demonstrates that its purpose was to create uniformity of treatment among the various tribes, and not to establish differences among them. The legislation was proposed by the Secretary of the Interior. H.R.Rep. 1872, 75th Cong., 3rd Sess. (1938); S.Rep. No. 985, 75th Cong., 1st Sess. (1937). His letter supporting the Act noted that "Under Section 17 of that act [the IRA] Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years." *Id.* However, there was no existing statutory authority for the leasing of certain other Indian lands. The letter went on: "One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." *Id.*

There is thus no merit whatever to Petitioner's suggestion that Congress, having passed the IRA amid assurances that it would leave unaffected those tribes rejecting it, and after the deadline for voting on the IRA had passed, immediately turned around and *sub silentio* opened a vast gulf between IRA and non-IRA tribes, seriously curtailing the sovereign powers of the latter. Rather, it is plain from the language of the proviso in the 1938 Act that all Congress did thereby was to leave to IRA corporations the powers already mentioned in the IRA, to lease tribal lands for not more than ten years.

This is precisely how the Interior Department has since read the proviso in Section 2 of the 1938 Act; *i.e.* as freeing IRA corporations with appropriate charter provisions from competitive bidding requirements, but *only* in the case of leases for not more than ten years. I.D.Memo. M-36040, July 5, 1950; I.D.Memo.M-36007, July 7, 1949.¹⁶

¹⁶Nor is anything in the Secretary's regulations to the contrary. Petitioner cites 25 C.F.R. § 211.29, which appears generally to permit the Secretary's regulations regarding mineral leases to be superseded by the terms of constitutions or charters adopted pursuant to the IRA, the Oklahoma Indian Welfare Act of June 26, 1936 (25 U.S.C. and Supp., §§ 501-509), or the Alaska Act of May 1, 1936 (48 U.S.C. §§ 362, 258a); as well as by tribal laws authorized thereunder. The scope of such a regulatory exemption is obviously broader than the proviso in the 1938 Act, which for example does not even mention the Oklahoma Act or the Alaska Act. Precisely for that reason, § 211.29 cannot be read as an interpretation of Congress' meaning in the proviso, but rather as representing an exercise of the Secretary's own regulatory discretion. Congress in Section 4 of the 1938 Act established that operations under all Indian mineral leases, regardless of form of tribal organization, were *subject* to Secretarial regulation. As part of the Secretary's regulatory scheme, he has specified the manner in which he will allow his general regulations to be superseded by tribes. This is consistent with the authority asserted by the Secretary to waive

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B. The Indian Mineral Leasing Act does not limit the taxing power of any tribes.

Interests in Indian trust lands cannot be conveyed except by the authority of Congress. 25 U.S.C. § 177. Before the 1938 Act was passed, there were classes of Indian land omitted from prior leasing statutes. H.R. Rep. 1872, 75th Cong., 3rd Sess. (1938); S.Rep. 985, 75th Cong., 1st Sess. (1937). The fundamental purpose of the 1938 Act Mineral Leasing Act was to enable all Indian tribes to lease their land. In order to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," *id.*, the particular leasing scheme developed was also intended to give Indians what they had not always had before, "the greatest return from their property," and "a voice in the granting of such leases." S. Rep. 985, 75th Cong., 1st Sess. at 2-3.

Claims that the purpose of the 1938 Act was to subordinate Indian management of Indian resources to Secretarial control, so that the Secretary could ensure an uninterrupted flow of minerals from Indian lands to the national markets, are completely unfounded. The Act

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or make exceptions to his regulations generally, 25 C.F.R. § 1, and with other cases where provision is made for supersession of regulations. See e.g. 25 C.F.R. § 11.1(e), permitting tribal ordinances to supersede the Code of Indian Offenses. It should also be noted that the purpose of regulations such as §§ 211.29 and 11.1(e) is to permit tribal law to supersede even those regulations with which they are in direct conflict. In the instant case, no "supersession" is required because the Secretary has determined that nothing in his regulations conflicts with tribal tax laws or requires his approval thereof. The very discretion reflected in § 211.29, pursuant to which the Secretary creates regulatory exemptions which the 1938 Act plainly did not require or even suggest, defeats the argument that if the 1938 Act permits the Secretary to regulate tribal taxation, it also compels him to do so.

was obviously unsuited to any such purpose, as it placed the most basic decision of all, whether or not to lease, in the hands of the Indian tribes. 25 U.S.C. § 396a.

The Secretary's role vis-a-vis the tribes is far more limited than Petitioner claims. Leases are granted by the tribes, not the Secretary.¹⁷ They must be approved by the Secretary, just as Congress has elsewhere "retained the power to scrutinize the various transactions by which the Indian might be separated from [his] property." *Poafpybitty v. Skelly Oil Company*, 390 U.S. 365, 369 (1968). As the Court in *Poafpybitty* noted, such restrictions are "mere incidents of the promises made by the United States in various treaties to protect Indian land." *Id.* They are not intended to restrict tribal governmental operations.

The Interior Department has clearly conceived of its role under the 1938 Act as being the protection of tribal property, not the control of tribal government. Interior Department officials have characterized the regulations under the Act as "rock bottom protection of Indians and the Bureau of Indian Affairs against scalping by mining company officials." Bureau of Competition, Federal Trade Commission, *Staff Report on Mineral Leasing on Indian Lands* 18 (October 1975). For the Interior Department to attempt to serve any other interests than the Indians' in its regulations under the Act would in fact be of questionable legality. The reason was put very well by

¹⁷Federal law does not implicitly pre-empt state taxation of federal proprietary leases; a *fortiori* it should not preclude tribal taxation of tribal leases. *United States v. Fresno*, 429 U.S. 452 (1977); *United States v. Detroit*, 355 U.S. 466, 495 (1958); *Elder v. Wood*, 208 U.S. 226 (1908); *Forbes v. Gracey*, 94 U.S. 762 (1877).

the Federal Trade Commission in its *Staff Report on Mineral Leasing on Indian Lands*, *supra*:

Indian land, unlike public land, does not belong to the Federal Government to alienate or encumber as it pleases; rather, Indian land is held in trust for the Indians and the traditional legal principles of trust law are generally applicable to its disposition. Consequently, federal land use policy regarding Indian lands is much more limited in scope than that regarding public land and cannot be shaped to accord with a federal energy policy which would dictate variance from the trust responsibility. Indian land leasing is more analogous to leasing of privately owned land than to leasing of public land.

Id. at 1.

In *Poafpybitty*, *supra*, which involved a similar regulatory scheme, the Court rejected the argument that the "Secretary has such complete control over" mineral leases of Indian allotments that only he can sue for their breach. Although respecting the Congressional intention that the Secretary be sufficiently involved in leasing matters to protect Indians from loss of their property, the Court found that to preclude independent legal action by allottees would frustrate another Congressional purpose—to "prepare the Indians to take their places as independent, qualified members of the modern body politic." 390 U.S. at 369. The Court noted also that the BIA was not in a position to manage all Indian trust property alone. Here there is an even greater distance than in *Poafpybitty* between the area of the Secretary's involvement (regulating lessees' operations, thereby protecting tribal property), and what the Tribe seeks to do (impose a uniform tax, a governmental matter). Here too it is fully possible, by upholding the taxing power of the Tribe, to further the

Congressional policies of tribal self-government and economic development without risking the loss of tribal property which the Secretary's involvement was designed to prevent. And here too the United States cannot be, and indeed does not wish to be, the sole provider of governmental services on the reservation.

As noted above, this Court has declined to find that Congress has limited the sovereign powers of Indian tribes without "clear indications" that Congress intended such a result. See discussion at p. 10, *supra*. It is impossible to find any intention to limit tribal taxing power in the 1938 Act. This Court in *Merrion* found that even a specific authorization of state taxation should not be construed to prohibit tribal taxation. 455 U.S. at 150, construing 25 U.S.C. §398c. The 1938 Act, by contrast, does not mention taxation at all.

Petitioner proposes overturning more than a century of Indian law and applying a whole new standard in these cases—that wherever the federal government involves itself to any extent in an area of Indian affairs, tribes may no longer exercise any jurisdiction, whether or not conflicting, over the same subject matter.¹⁸ This unprece-

¹⁸There is of course an enormous difference between the standards used to determine where Congress has divested a tribe's powers, and those used to determine where the federal regulation of Indian matters has pre-empted state jurisdiction over Indian lands. See *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611, 620, 103 S.Ct. 2378 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980). The test a state must meet in this class of cases is an especially stiff one, for exactly the same reason that the courts do not incline toward finding tribal powers to have been divested—i.e., the Congressional policy favoring tribal government of Indian country. *Id.* at 142-145, *New Mexico v. Mescalero Apache*

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dedented approach would wreak havoc with Congress' policy of encouraging tribal self-government, because there are virtually no aspects of tribal affairs untouched by the federal government. In order to reconcile the Congressional policy in favor of Indian self-determination with the plenary powers of Congress, the mere involvement of the federal government cannot be interpreted as ousting tribal jurisdiction. To do so would be to turn every act of Congress intended to benefit Indian tribes into an unintended diminishment of their sovereignty.

Petitioner fails to recognize the distinction between tribal proprietary and tribal governmental matters which was emphasized by this Court in *Merrion*. A lease is a conveyance of a *property* interest, and not a certificate exempting the lessee from tribal laws of general applicability. That the Indian Mineral Leasing Act was directed at tribal proprietary matters is borne out by the regulations that the Secretary has promulgated. 25 C.F.R. Part

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Tribe, supra, 76 L.Ed.2d at 620; *Ramah Navajo School Board v. New Mexico*, 458 U.S. 832, 845-847 (1982). Far from vying with one another, the federal regulatory involvement and the tribal interest in self-government have been held in these cases to erect two "independent but related" barriers to state jurisdiction. *Ramah, supra*, 73 L.Ed.2d at 1179, quoting *White Mountain, supra*.

Given that state claims to tax reservation mineral activities are clearly not as strong as the Tribe's, see also *Merrion*, 455 U.S. at 159, Petitioner's argument here would a *fortiori* relieve it from state taxation as well. Petitioner has in fact filed suit claiming that Arizona's taxes on its Navajo mineral lease improvements are pre-empted by the 1938 Act and "obstruct the Congressionally mandated power of the Navajo Tribal Council to lease Reservation property, subject to the approval of the Secretary of the Interior, in order to further Tribal development goals." *Kerr-McGee v. Red Mesa Unified School District No. 27*, (Ariz. Superior Ct., Apache Cty., No. 21-757), ¶ 25 of Complaint.

211.¹⁹ Despite Petitioner's insistence on their breadth, the regulations provide virtually nothing that a private owner of mineral lands would not address in the terms of a lease. Like the Act, the regulations do not bear at all on the question of governmental services or the raising of revenues to support them. There is simply no inconsistency between any provision of the regulations and tribal taxation.

Consistent with their proprietary orientation, the regulations are obviously directed at the activities of lessees, and not of other entities such as tribal governments. This is what Congress called for when it provided that "All operations under any oil, gas, or other mineral lease . . . shall be subject to the rules and regulations promulgated by the Secretary of the Interior." 25 U.S.C. § 396d. Tribal taxes are not operations under a lease.

The Secretary has promulgated no regulations bearing on the tribal taxes at issue, save the guidelines confirming that they do not require his approval. See Appendix. This case does not call for a determination of the limits of the Secretary's regulatory authority. What is at issue here is the Secretary's determination that he need not act at all. In order to prevail, Petitioner must show not only that Congress granted the Secretary the power to control Navajo taxation, but also that

¹⁹The Secretary's interpretation of the Act is entitled to great weight, especially as it was originally proposed by the Interior Department, and that agency has been responsible for implementing the legislation since its inception. *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940).

he has a non-discretionary duty to exercise that power. This it cannot do. Even in those cases where a federal agency has clear authority to issue regulations pre-empting local law, no pre-emption occurs unless and until such regulations issue. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 172 (1978).

Here as elsewhere, Petitioner begins by arguing for broad Secretarial authority in Indian affairs, and ends by suggesting the Secretary has no choice but to manage those affairs in the manner favored by oil and gas producers. Neither the 1938 Act nor anything else in federal law supports this contention.

VI. Allegations About the Administration and Enforcement of the Navajo Tax Laws Are Premature and Unfounded.

This case presents only one issue for decision: whether the Navajo Tribe can levy taxes against Petitioner without Secretarial approval. Petitioner and its supporting *amici* attempt to inject into the case a grab-bag of completely speculative issues, ranging from what enforcement mechanisms the Tribe may lawfully use against Petitioner, or even against other taxpayers, when and if they become delinquent, to how taxation should be managed in the former Navajo-Hopi Joint Use Area. In addition to being outside the scope of the question presented, these matters do not even rise to the level of a case or controversy. United States Constitution, Art. III, Sec. 2. Neither this Court, the Tribe, nor anyone else can reasonably be expected to answer in advance every question which could conceivably arise in the course of an entire tax program.

None of these protestors has ever attempted to enforce any rights in tribal forums, nor have they yet had occasion to appeal any assessment of a Navajo tax.²⁰ The Tribe has never taken any enforcement action against any person under the tax laws. What Petitioner and the *amici* are therefore asking this Court to do is to *assume* that the Tribe will deny it due process and other rights at every turn, and to weigh this completely ungrounded assumption into its consideration of the validity of the tax.

The enforcement mechanisms about which Petitioner complains are closely modelled on those used by other governments. States routinely enjoin delinquent taxpayers from continuing in business; take liens on, seize, and sell the property of delinquent taxpayers; and even use criminal penalties to enforce their tax laws. *See e.g.* N.M.Stat.Anno. (1978) §§7-1-1—7-1-82; Ariz.Rev.Stat. §§42-1334, 42-1821. In specific circumstances the Tribe may seek to use these remedies as well.²¹ Contrary to

²⁰The tax laws provide for assessments to be appealed to the Navajo Tax Commission and from there to the Navajo Court of Appeals. 24 Nav.Tr.Code §§220, 427, Jt.App. 44-45, 60-61 (§§234, 434 of 1984 amendments lodged with Clerk). The allegations of *amici* supporting Petitioner notwithstanding, they do not provide for further review in the Tribal Council or any other tribal forum.

²¹The tax laws do not include lease cancellation as an enforcement mechanism. They do provide in particular circumstances for sanctions extending to exclusion of individuals from all or part of the Reservation and suspension of rights to do business. *See New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611, 626 n.27 (1983); *Merrion*, 455 U.S. at 144. If Petitioner believes it is shielded from any particular enforcement mechanism by virtue of rights granted in its leases, it may assert that protection if and when the Tribe ever attempts to use such a mechanism against it. That issue however in no way bears on the question presented in this case: whether the Navajo Tribe can effectively levy taxes against Petitioner with-

(Continued on next page)

Petitioner's assumption, however, the tax laws do not apply only to trust land mineral leases or to non-Indian owned corporations. Their coverage extends to a variety of persons including members of the Navajo tribe, persons doing business on reservation fee land owned by the Tribe, and businesses such as construction companies which may operate on the reservation pursuant to no leases or licenses at all. The applicability of the various enforcement mechanisms to the multiplicity of taxpayers, in their diverse circumstances can only be determined on an individual basis. Moreover, detailed regulations necessary to the implementation of certain enforcement measures are still forthcoming.

Petitioner and the *amici* suggest that they have no forum whatever to determine the legality of actions the

(Continued from previous page)

out Secretarial approval. See *Ohio River & Western Ry. Co. v. Dittey*, 232 U.S. 578 (1914) (Court in upholding imposition of tax will not rule on validity of penalty provisions not yet used, especially in light of severability clause in statute); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1259 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (court in upholding liability of Indian land mineral lessees for state possessory interest taxes not required to trace precise accommodations required to protect Indian owners when taxes enforced against delinquent lessees, even where state had earlier advertised sale of tribal mineral leaseholds); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 993.

Restrictions on tribal powers imposed by federal law are of course effective whether or not specifically written into tribal ordinances. It may however be noted that the Tribe in its laws does acknowledge certain such limitations, for example that it may imprison Indians but not non-Indians for offenses such as tax fraud and bribery, and that in certain instances federal law may prevent the seizure and sale of property without the approval of the Secretary. 24 Nav.Tr.Code §§ 221, 225(f), 421, 425(f) (as amended 1984; lodged with Clerk). See *Alaska Consolidated Oil Fields v. Rains*, 54 F.2d 868 (9th Cir. 1932); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978).

Tribe may take against them. They seem in this respect to ignore the existence of this very lawsuit. There is no reason to believe that if tribal officers threaten actions arguably beyond the Tribe's power under federal law, the federal courts will not hear suits for injunction just as they have done here. It is true that in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court found that Congress did not intend the Indian Civil Rights Act to create a federal cause of action other than *habeas corpus*. But the oil companies ignore the rest of this Court's holding: "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." *Id.* at 65. The Court recognized tribal courts as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"²² (as well as recognizing non-judicial tribal institutions as "competent law-applying bodies"). *Id.* Congress may change this scheme if it wishes, but as the purpose of the current arrangement is to protect tribal sovereignty, it is a perversion of that purpose to attempt to use it as an excuse for limiting tribal governmental powers. Navajo tribal courts are avail-

²²In specific instances other forums are also available. For example *amicus curiae* Salt River Project fails to mention that the same lease which it identifies as containing a tribal tax waiver also provides for determination of disputes thereunder by the Secretary. For that reason, and contrary to SRP's implication, nothing about the lease terms was presented for decision in the earlier litigation between the Tribe and SRP. *Salt River Project v. Navajo Tribe*, No. 78-352 (D.Ariz., July 11, 1978); *vacated as moot*, Nos. 78-3492 and 78-3028 (9th Cir. 1982). The fact that SRP was sufficiently aware of Navajo taxing powers fifteen years ago to address them in a lease (as did *amicus curiae* Arizona public service company nine years earlier still), belies its claim that *Merrion* was a "jolt" to Indian law.

able to hear claims against tribal officials based on the Indian Civil Rights Act, as well as on other law. *See, e.g.*, 24 Nav.Tr.Code § 624 (d) (1980). Neither Petitioner nor the *amici* have ever attempted to bring any such claims in tribal forums.

Petitioner as well as some of the *amici* have however commented on regulations proposed by the Navajo Tax Commission, in writing or at hearings before the Commission. There is nothing to prevent these companies from advocating their views with tribal lawmakers in the same way as they do with other governments. The lack of suffrage can be no impediment, as corporations are no more able to vote in state or federal elections than in tribal ones. Here as elsewhere corporations "vote" only to the extent that they have employees or shareholders who are citizens of the jurisdiction. *See also Barta v. Oglala Sioux*, 259 F.2d 553, 557 (8th Cir. 1958).

The only question ripe for decision is whether the Navajo Tribe can effectively levy taxes against Petitioner without the approval of the Secretary of the Interior. It is respectfully submitted that that question must be answered in the affirmative.

CONCLUSION

The power to tax is an inherent sovereign power which Congress has never divested or conditioned on Secretarial approval. It is both necessary and desirable for tribes to utilize this power. Services once provided in Indian country by federal programs using federal tax dollars are now, with the active encouragement of both Congress and the

executive branch, provided instead by tribal governments. Since this Court's decision in *Merrion*, Congress has reaffirmed its support for tribal taxation by expressly accommodating it in its own tax scheme. 26 U.S.C. § 7871(a) (3). President Reagan has reiterated in his Statement on Indian Policy that tribes should have the "primary responsibility" for meeting the needs of their citizens and that it is "important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." Weekly Compilation of Presidential Documents, Vol. 19, no. 4, at 99 (January 31, 1983). This is precisely what the Navajo Tribe is attempting to do.

There is nothing unlawful about requiring Kerr-McGee to contribute to the support of governmental programs from which it benefits. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 1984

APPENDIX

App. 1

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington, D.C. 20245

GUIDELINES

Review of Tribal Ordinances Imposing
Taxes on Mineral Activities

Approved:

/s/ Ken Smith

Assistant Secretary — Indian Affairs

Jan. 18, 1983

REVIEW OF TRIBAL ORDINANCES IMPOSING
TAXES ON MINERAL ACTIVITIES
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1.1 *Introduction.*

- A. *Purpose.* These guidelines are intended:

(1) To implement the Area Directors' authority to review or approve tribal ordinances imposing taxes on mineral activities by suggesting a procedure by which tribes can consider interests of persons affected by their taxing ordinances, and by establishing a standard for review of such ordinances by the Area Directors; and

(2) To assist Indian tribes in the exercise of their inherent authority to tax mineral activities within their jurisdiction.

- B. *Scope.* These guidelines apply to tribal ordinances which tax mineral activities where Secretarial review or

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approval is expressly required by federal law, the constitution of the tribe, the ordinance itself, or other tribal law.

1.2 *Definitions.* As used in these guidelines:

A. "Area Director" means the Bureau of Indian Affairs official in charge of an Area Office who, pursuant to 209 DM 8 and 10 BIAM 3, exercises the Secretary's authority to approve or disapprove tribal ordinances, except that, with respect to the Navajo Reservation, it means the Deputy Assistant Secretary—Indian Affairs (Operations).

B. "Area Director's approval" includes an Area Director's decision not to rescind an ordinance which has been approved by the Superintendent.

C. "Area Director's disapproval" includes an Area Director's rescission of an ordinance which has been approved by the Superintendent.

D. "Indian tribe" or "tribe" means any Federally recognized Indian tribe, band, nation, pueblo or other tribal entity which has the inherent authority to tax.

E. "Minerals" includes both metalliferous and non-metalliferous minerals and also includes sand, gravel, pumice, cinders, granite, building stone, limestone, clay, and silt.

F. "Secretary" means the Secretary of the Interior or his authorized representative.

G. "Superintendent" means the Bureau of Indian Affairs official in charge of an agency office except that, with respect to the Navajo Reservation, it means the Navajo Area Director.

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H. "Tax on mineral activities" means a tax imposed:

- (1) Upon the production of minerals;
- (2) Upon the proceeds from production of minerals; or
- (3) Upon an interest of a person or entity engaged in the production and or transportation of minerals when that interest is directly related to the production and or transportation of minerals.

I. "Tribal ordinance" or "ordinance" means a tribal legislative enactment in the form of either a resolution or an ordinance.

1.3 *Procedures Precedent to Enactment of Ordinance.*

A. *Tribe's Notice to Superintendent.* The Area Director shall not approve a tribal ordinance subject to these guidelines unless, prior to enactment, the tribe has given the Superintendent at least forty-five (45) days notice, in writing, of intent to enact the ordinance.

B. *Superintendent's Notice to Public.* The Superintendent will give thirty (30) days notice to the public of the tribe's intent to enact the ordinance. The Superintendent's notice will be posted at public places on the reservation and published in the local tribal newspaper, if any, a newspaper of general circulation in each state in which the tribe's reservation is located, and the newspaper for legal notice designated by each county in which the tribe's reservation is located. The notice will state where a copy of the proposed ordinance and the tribal constitution, if any, may be inspected. It will invite the public to submit written statements to the tribe and advise commenters to send copies of their statements to the Super-

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intendent at the same time they submit the statements to the tribe.

C. *Hearing.* Prior to enacting an ordinance, a tribe may hold a public hearing if it deems it advisable.

D. *Pre-Enactment Considerations by Tribe.* Prior to enacting an ordinance, a tribe may want to consider (1) the effect of the proposed tax upon mineral production on the tribe's reservation, (2) the effect of the tax, if any, upon individual Indian owners of minerals, title to which is held in trust by the United States or which is subject to a federal restriction against alienation, (3) the economic effect of the tax upon consumers and (4) the revenues that will be provided to the tribe by the tax.

E. *Required Submissions to Superintendent.* The Area Director shall not approve an ordinance subject to these guidelines unless the tribe has submitted to the Superintendent: (1) a written notice of intent to enact the ordinance as required by subsection 1.3A, (2) a verbatim transcript of any public hearing held, and (3) other documents, if any, which the tribe believes will aid in review.

1.4 *Review Procedure: Superintendent.*

A. *Tribal Constitutional Requirements.* The Superintendent will review the ordinance in accordance with the review authority and time limits, if any, provided for the Superintendent's action in the tribal constitution.

B. *Approval by Superintendent.* If the Superintendent approves the ordinance pursuant to authority granted in the tribal constitution, he/she will forward the ordinance, the verbatim transcript of any public hearing held by the tribe, any other documents submitted by the tribe,

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a copy of the published or posted notice, and the copies of statements received from the public, to the Area Director as soon as possible but not later than five (5) days after he/she approves the ordinance. The Superintendent will notify persons who have submitted copies of statements to him/her (1) that the Superintendent has approved the ordinance, (2) that the ordinance and the statements have been forwarded to the Area Director and (3) that commenters may make additional comments to the Area Director provided they furnish a copy of the additional comments to the tribe.

C. *Disapproval by Superintendent.* If the Superintendent disapproves the ordinance pursuant to authority granted in the tribal constitution, he/she will return the ordinance to the tribe in accordance with the provisions of the tribal constitution. If authorized by the tribal constitution to disapprove a tribal ordinance, the Superintendent will disapprove the ordinance if the tribe has failed to comply with the requirements of subsections 1.3A and E. The Superintendent's disapproval under this section does not preclude the tribe from appealing the disapproval to the Area Director in accordance with the provisions of the tribal constitution.

D. *Transmittal by Superintendent Who Is Not Given Approval Authority in Tribal Constitution.* If the Superintendent has not been granted authority by the tribal constitution to approve or disapprove the ordinance, he/she will forward the ordinance, the verbatim transcript of any public hearing held by the tribe, any other documents submitted by the tribe, a copy of the published or posted notice, and the copies of statements received from

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the public to the Area Director as soon as possible but not later than ten (10) days after he/she receives the ordinance. The Superintendent will notify persons who have submitted copies of statements to him/her (1) that the ordinance and the statements have been forwarded to the Area Director and (2) that commenters may make additional comments to the Area Director provided they furnish a copy of the additional comments to the tribe.

1.5 *Review Procedure: Area Director.*

A. *Pre-Approval Meeting.* If the tribe or an affected taxpayer who submits comments on the tribal tax ordinance requests a meeting with the Area Director on the ordinance, prior to his decision to approve or disapprove the ordinance, the Area Director shall hold such a meeting. If the tribe requests such a meeting, the Area Director shall inform the affected taxpayers who had submitted comments of the meeting and allow such taxpayers to participate in the meeting. If an affected taxpayer who has submitted comments requests such a meeting, the Area Director shall inform the tribe and the other affected taxpayers who have submitted comments of the meeting and allow the tribe and such taxpayers to participate in the meeting. At the meeting the tribe and the taxpayers may submit any testimony related to the ordinance which they deem relevant. An adequate record of the meeting shall be made either in writing or by machine transcription. This record shall be made a part of the record upon which the Area Director relies to make his decision to approve or disapprove the ordinance.

B. *Record for Review.* The Area Director will base his review on:

- (1) The ordinance;

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(2) Documents submitted by the tribe pursuant to subsection 1.3E;

(3) Copies of written statements submitted to the Superintendent pursuant to subsection 1.3A;

(4) Written statements submitted to the Area Director pursuant to subsection 1.4B or D;

(5) Testimony at any meeting held by the Area Director pursuant to subsection 1.5A.

Review of the ordinance will be completed within the time limits, if any, in the tribal constitution. In the case of tribes without time limits in their constitution, review will be completed within ninety (90) days of receipt of the ordinance by the Area Director.

C. Notice of Approval. The Area Director will notify the tribe in writing of his approval or disapproval of the ordinance and will publish notice of approval of the ordinance in the local tribal newspaper, if any, a newspaper of general circulation in each state in which the tribe's reservation is located, and the newspaper for legal notice designated by each county in which the tribe's reservation is located. The Area Director in approving or disapproving a tribal tax ordinance shall set forth his reasons for such approval or disapproval, including a brief response to any testimony given by the tribe or affected taxpayers at a meeting held pursuant to subsection 1.5A, and furnish a written copy of such response to the tribe and all affected taxpayers who attended the meeting.

1.6 *Standard of Review.*

A. Area Director's Approval. The Secretary will approve a tribal ordinance subject to these guidelines un-

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less he finds that one or more of the grounds for disapproval listed in paragraph (B) of this section exist with respect to the ordinance.

B. Grounds for Area Director's Disapproval. The Secretary will disapprove a tribal ordinance subject to these guidelines if he finds that:

(1) The tribe has failed to comply with the requirements of subsections 1.3A or E.

(2) The ordinance was enacted by a tribal governing body to which the tribe's constitution, if the tribe has a constitution, has not delegated the power to impose the tax.

(a) If the tribe has a constitution, the power to impose the tax will be considered delegated to the governing body if the power to tax is expressly delegated in the constitution, or if the constitution contains a general delegation of all inherent powers of the tribe to the governing body. It will not be considered delegated if the constitution vests specific powers in the governing body and those specific powers do not include the power to tax.

(b) Unless their powers are specifically limited by the tribal documents which established them, the governing bodies of tribes without written constitutions will be considered to possess the authority to exercise the inherent power of the tribe to tax;

(3) The ordinance does not provide a procedure, in the ordinance itself or by reference to other tribal law, by which a taxpayer may contest his or her tax liability, and be afforded a right to a hearing before a tribal forum other than the body which enacted the tax; or

(4) The ordinance violates federal or tribal law.

1.7. *Appeals.* Approval or disapproval of an ordinance may be appealed pursuant to 25 CFR Part 2. However, the Secretary may not approve or disapprove an ordinance outside the time limits, if any, in a tribal constitution. Nothing in these guidelines precludes a tribe from amending a disapproved ordinance to cure the grounds for disapproval and resubmitting the amended ordinance for review in accordance with these guidelines.

1.8. *Review of Amendment to Ordinance.* An amendment to a previously-approved tribal ordinance imposing taxes on mineral activities is subject to these guidelines if it effects a change in the rate of taxation, the basis of taxation, or the class of persons or entities subject to the tax. An amendment which does not effect a change in the rate of taxation, the basis of taxation, or the class of persons or entities subject to the tax is not subject to these guidelines but remains subject to the review or approval procedures specified in the tribal constitution, the ordinance itself, or other tribal law.

For purposes of this section, a change in the basis of taxation means a change in the base subject to the tax that would substantially affect the tax liability of the taxpayer. Examples of a change in the basis of taxation include (1) change from a tax on net proceeds to a tax on gross proceeds, (2) removal of deductions and/or exemptions contained in a tax, and (3) change in the method of establishing value, *e.g.*, from 50% of fair market value to 100% of fair market value.

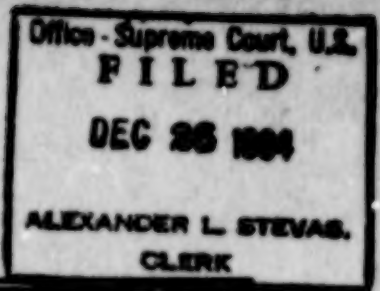
1.9. *Amendment of Guidelines.* These guidelines shall not be amended except as follows:

A. *Notice and Comment.* Sixty (60) days prior to issuing the amendment to the guidelines, the Secretary shall publish in the Federal Register a notice of such amendment together with the text of the proposed amendment and provide the public, in such notice, with at least thirty (30) days to comment on such amendment; and

B. *Publication of Amendment.* Concurrent with issuing the amendment to the guidelines the Secretary shall publish a notice in the Federal Register of such amendment, together with a short statement of the Secretary's reasons for making such amendment and a response to any public comments.

No. 84-68

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1984

KERR-McGEE CORPORATION,

PETITIONER,

-vs-

NAVAJO TRIBE OF INDIANS,

RESPONDENTS.

**ON WRIT OF CERTIORARI TO
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THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

KERR-McGEE CORPORATION,
PETITIONER,

-vs-
NAVAJO TRIBE OF INDIANS,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE
SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA

The Sac and Fox Tribe of Indians of Oklahoma respectfully submits this brief as amicus curiae in support of the position of respondent Navajo Tribe of Indians. Written consent for the filing of this brief has been mailed by both parties and will be forwarded for filing upon receipt.

INTEREST OF AMICUS CURIAE

The Sac and Fox Tribe of Indians of Oklahoma is a federally recognized tribe of Indians located in the State of Oklahoma. The Sac and Fox Tribe of Indians of Oklahoma (hereinafter referred to as the Sac and Fox Tribe) has adopted a written Constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, Act of June 26, 1936, Ch. 831, §3, 49 Stat. 1967, codified at 25 U.S.C.A. §503.

Pursuant to this Constitution, the Legislature of the Sac and Fox Tribe has enacted a myriad of ordinances which regulate the conduct of both members and non-members within the Indian Country subject to the jurisdiction of the Sac and Fox Tribe. Some of those ordinances include a Business Corporation Act, providing for the incorporation and domestication of corporations within the tribal jurisdiction, a Grievance Committee Procedure Act, providing for the removal or discipline of elected tribal officers under certain conditions, a

Bingo Ordinance, providing for the licensing and regulation of bingo activities within the tribal jurisdiction, a Mineral Leasing Act, regulating the execution, operations, and terminations of leases of tribally owned minerals including oil and gas, and a General Revenue and Taxation Act, providing for the levy, administration, and collection of tribal taxes upon such things as tobacco, sales of personal property, employee's earnings, possessory interests such as leases in tribal or individual trust lands, the severance of oil and gas from Indian lands, the net receipts of licensed bingo operators, and motor vehicles. These taxes apply to all persons and property located within the Indian country subject to the jurisdiction of the Sac and Fox Tribe, and are paid by both Indians and non-Indians alike. The funds received from tax revenues are expended exclusively for the expenses of the tribal government in providing services such as governmental administrative expenses, police protection, fire protection, road maintenance, and similar expenses utilized by all taxpayers within the tribal jurisdiction. The Legislature of the Sac and Fox Tribe has regularly waived its

sovereign immunity into the Courts of the Tribe in these ordinances, and have authorized the Tribal Court to protect the rights of all persons against actions of tribal executive and legislative officers.

The Constitution of the Sac and Fox Tribe, as approved by the Secretary of the Interior, contains no requirement that any ordinance of the Legislature of the Tribe be approved by the Secretary of the Interior. In adopting tribal legislation, the tribal Legislature regularly submits tribal legislation, at some stage of the tribal legislative process to the agents of the Secretary of the Interior for their information, review, and comments. However, the Secretary has repeatedly expressed to the Sac and Fox Tribe his determination that it is not only unnecessary but also inappropriate for his office to approve the general legislation of the Sac and Fox Tribe, in the absence of a statutory or tribal constitutional requirement for his approval.

Due to the lack of any express requirement in tribal law or federal statutory law that the Secretary of the Interior approve general tribal legislation, and the specific

determination by the Secretary that his approval was not required in order for this legislation to be valid, none of the general legislative enactments of the Sac and Fox Tribe has been approved by the Secretary of the Interior. A decision of this Honorable Court requiring Secretarial approval of tribal legislative enactments in the absence of a specific tribal or Congressional requirement for such approval would literally wipe all Sac and Fox Tribal legislation from the books, create immediate chaos in the area of law enforcement and tribal government, and cause the disintegration of the legal foundation for every economic activity within the tribal jurisdiction. The Sac and Fox Tribe has an essential and compelling interest in the maintenance of law and order and the regulation of and authorization for business and personal activities of persons within the jurisdiction of the Tribe in order to provide for and promote the peace, safety, and welfare of all persons who live, work, or otherwise enter into the tribal jurisdiction having a significant relationship to the Sac and Fox Tribe or its members. For these reasons, the Sac and Fox Tribe has an essential and compelling

interest in this case arising out of an unprincipled challenge to the rights of a tribal government to require a business corporation to contribute its fair share to the expenses of maintaining a civilized society within which it can conduct its business operations for profit.

SUMMARY OF ARGUMENT

The Navajo Tribe of Indians is a federally recognized Indian Tribe having a long standing treaty relationship with the political departments of the United States Federal Government. Within the context of this relationship, the authority of the Navajo Tribe to tax all entities, including legal persons such as corporations, who conduct business activities within the tribal jurisdiction has never been limited. Nor has any requirement that legislative enactments of the Navajo Tribe relating to taxation must be approved by the Secretary of the Interior, or any other federal agent, been agreed to by treaty, nor imposed by any federal statute enacted by the Congress.

No one forces oil companies or others to enter into the jurisdiction of the Tribe to conduct their business

activities. Oil companies cannot complain that they have no remedy simply because they refuse to exercise the remedies available to them pursuant to tribal law. Kerr-McGee Corporation has exactly the same rights and remedies as a business corporation formed by Indians pursuant to Navajo law would have, and somehow believes that this Court, in the absence of any statutory requirement therefore, should condone a position in which there is one rule for corporations with Indian stockholders, another for corporations with non-Indian stockholders, and perhaps another rule for corporations with both Indian and non-Indian stockholders. Such a position is untenable.

In the absence of a specific requirement in either federal or tribal law that Navajo Tribal legislation relating to taxation be approved by the Secretary of the Interior, no such requirement exists, and the Navajo tribal taxes at issue here are valid and enforceable.

ARGUMENT

PROPOSITION I

INDIAN TRIBES ARE SOVEREIGN ENTITIES ENTITLED TO EXERCISE THE AUTHORITY TO TAX ALL PERSONS AND PROPERTY WITHIN THE INDIAN COUNTRY SUBJECT TO THEIR JURISDICTION IN ORDER TO PROVIDE GOVERNMENTAL SERVICES WITHIN THEIR TERRITORIAL JURISDICTION.

It is beyond cavil that the lands within the Navajo Indian Reservation, irrespective of any rights of possession or user, are Indian Country. 18 U.S.C. §1151. While the term "Indian Country" has been used in many different senses, it has traditionally been defined as country within which Indian tribal laws, whether express legislative enactments or tribal law in the form of traditional usages and customs, and federal laws relating to Indians are generally applicable to the exclusion of state laws. F. Cohen, *Handbook of Federal Indian Law*, 5 (1942). Felix Cohen, the noted Indian law scholar previously recognized

by this Court as the eminent authority in the field,¹ reviewed the historical development of the term Indian Country, *Id.* at pages 5 and 6:

The Indian country at any particular time must be viewed with reference to the existing body of federal and tribal law. Until 1817, it is country within which the criminal laws of the United States are not generally applicable, so that crimes in the Indian Country by white against whites, or by Indians, are not cognizable in state or federal courts any more than crimes committed on the soil of Canada or Mexico. Treaties defined the boundaries between the United States, or the separate states, and the territories of the various Indian Tribes or nations. Within these territories the Indian tribes or nations had not only full jurisdiction over their own citizens, but the same jurisdiction over citizens of the United States that any other power might lawfully

1. Squire v. Capoeman 351 U.S. 1, 8-9 (1956).

exercise over emigrants from the United States.² Treaties between the United States and various tribes commonly stipulated that citizens of the United States within the territory of the Indian nations were subject to the laws of those nations.³

and further:

Indian country in all these statutes [the original federal legislation defining the Indian country and extending certain aspects of federal law to certain persons or property therein] is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases

2. It is interesting to note in this connection that some of the early Trade and Intercourse Acts contained a provision requiring a citizen or inhabitant of the United States to acquire a passport before going into the country secured by treaty to the Indians. Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, 2 Stat. 139

3. Treaty of January 21, 1785, with Wiandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16; Treaty of November 28, 1785, with the Cherokees, 7 Stat. 18; Treaty of January 3, 1786, with the Choctaw Nation, 7 Stat. 21; Treaty of January 10, 1786, with the Chickasaw Nation 7 Stat. 24; Treaty of January 31, 1786 with the Shawanoe Nation, 7 Stat. 26; Treaty of January 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Pattawattima, and Sac Nation, 7 Stat. 28; Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35; Treaty of July 2, 1791, with the Cherokee Nation, 7 Stat. 39; Treaty of August 3, 1795, with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel River, Wees's, Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49.

designated by the statute, and state law is not applicable at all. This conception of the Indian country reflects a situation which finds its counterpart in international law in the case of newly acquired territories, where the laws of those territories continue in force until repealed or modified by the new sovereign.

It is, therefore, clear that the question of whether an Indian tribe has the authority to tax corporations doing business within the Indian Country subject to the jurisdiction of that Tribe absent Secretarial approval must be determined in light of this historical understanding and the current federal policy of tribal self-determination and limitation of federal involvement in the affairs of the Tribes.

The most basic principle of Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished. The statutes of Congress then, must be examined to determine the express limitations placed upon tribal sovereignty rather than to

determine its sources or positive content. Cohen, Handbook of Federal Indian Law 122, (1945); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 71 L.Ed.2d 21 (1982)(inherent power to tax, regulate, and exclude non-Indians); Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 493 (1981)(inherent power to exercise civil jurisdiction and regulate non-Indian activities on Indian lands, including leases); Washington v. Confederated Tribes, 447 U.S. 134, 65 L.Ed.2d 10 (1980)(inherent power to tax); United States v. Wheeler 435 U.S. 313, 55 L.Ed.2d 303 (1978)(power to exercise criminal jurisdiction over Indians); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L.Ed.2d 106 (1978)(membership, and immunity from suit by reason of sovereign immunity); Roff v. Burney 168 U.S. 218, 42 L.Ed 442 (1897)(membership); Jones v. Meehan 175 U.S. 1, 44 L.Ed 49 (1899)(inheritance); United States v. Quiver 241 U.S. 602, 60 L.Ed 1196(1916)(domestic relations); Worcester v. Georgia 31 U.S.(6 Pet.) 515, 8 L.Ed 483 (1832)(power to exclude nonmembers).

Indian tribes, as distinct political communities retaining their original natural rights of self-government, remain a separate people with the power of regulating both their members and other persons or entities within their territory when the nonmembers have significant impact on the tribe or its members. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832); United States v. Mazurie 419 U.S. 544, 42 L.Ed.2d 706 (1975); United States v. Kagama 118 U.S. 375, 30 L.Ed 228 (1886); United States v. Wheeler 435 U.S. 313, 55 L.Ed.2d 303 (1978); Santa Clara Pueblo v. Martinez 436 U.S. 49, 56 L.Ed.2d 106 (1978); Montana v. United States 450 U.S. 544, 67 L.Ed.2d 493 (1981); Washington v. Confederated Tribes 447 U.S. 134, 65 L.Ed.2d 10 (1980); Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982); F. Cohen, Handbook of Federal Indian Law 122-23 (1942).

The inherent power to tax, regulate, and exclude non-Indians has been consistently upheld, and the widely held understanding of the federal government has always been that federal laws have not worked a divestiture of

such powers. Worcester v. Georgia 31 U.S. (6 Pet.) 515, 8 L.Ed 483 (1832); Jones v. Meehan 175 U.S. 1, 44 L.Ed 49 (1899); Washington v. Confederated Tribes 447 U.S. 134, 152-53, 65 L.Ed.2d 10, 28-29 (1980); Montana v. United States 450 U.S. 544, 565-66, 67 L.Ed.2d 493, 510-11 (1981); Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. July 7, 1983) Cert denied, 81 L.Ed.2d 362 (1984); Babbit Ford v. Navajo Indian Tribe 710 F.2d 587 (9th Cir. 1983); Southland Royalty Company v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983). The outgrowth of this historical and decisional perspective is the repeated determination that Indian Tribes have the inherent authority to enforce their own laws in their own forums as to both Indians and non-Indians. Williams v. Lee 358 U.S. 217, 3 L.Ed.2d 251 (1959); Fisher v. District Court 424 U.S. 382, 47 L.Ed.2d 106 (1976); Santa Clara Pueblo v. Martinez 436 U.S. 49, 56 L.Ed.2d 106 (1978); Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982); Cardin v. De La Cruz 671 F.2d 363 (9th Cir.

1982) cert. den. 74 L.Ed.2d 277 (1982); New Mexico v. Mescalero Apache Tribe ___ U.S. ___, 76 L.Ed.2d 611 (1983); White v. Pueblo of San Juan 728 F.2d 1307 (10th Cir. 1984).

Within the Indian Country, the repeated litigation in this, and other courts, has clearly shown that Indian Tribes may regulate, through taxation, licensing, or other means, the activities of non-Indians who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements and clearly may do so where the conduct of the non-Indian threatens or has a direct effect on the political integrity, economic security, or the health and welfare of the tribe. Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982); Montana v. United States 450 U.S. 544, 565-66, 67 L.Ed.2d 493, 510-11 (1981); Washington v. Confederated Tribes 447 U.S. 134, 153-55, 65 L.Ed.2d 10, 28 (1980); Williams v. Lee 358 U.S. 217, 3 L.Ed.2d 251 (1959); Morris v. Hitchcock 194 U.S. 384, 48 L.Ed 1030 (1904); Fisher v. District Court

424 U.S. 382, 47 L.Ed.2d 106 (1976); Buster v. Wright 135 F. 947 (8th Cir. 1905) appeal dismissed. 203 U.S. 599, 51 L.Ed. 334 (1906); Maxey v. Wright 34 S.W. 807 (Ct. App. Ind. Terr.) affirmed. 105 F. 1003 (8th Cir. 1900); Barta v. Oglala Sioux Tribe 259 F.2d 553 (8th Cir. 1958); Trans-Canada Enterprises, Ltd v. Muckleshoot Indian Tribe 634 F.2d 474 (9th Cir. 1980); Cardin v. De La Cruz 671 F.2d 363, 366 (9th Cir. 1982) cert. denied. 459 U.S. 967, 74 L.Ed.2d 277 (1982); Knight v. Shoshone and Arapaho Tribes 670 F.2d 900 (10th Cir. 1982); Ortiz-Barraza v. United States 412 F.2d 1176, 1179 (9th Cir. 1975); Confederated Salish and Kootenai Tribes v. Namen 665 F.2d 951, 963-64 (9th Cir. 1982); Colville Confederated Tribes v. Walton 647 F.2d 42 (9th Cir. 1981).

When considering whether any particular legislation imposes limitations upon the governing authority of Indian Tribes, except the authority to enter into relationships with foreign sovereigns without the consent of the United States - a limitation found in most Indian treaties, that legislation or treaty must be liberally construed in the

interest of the Tribe, and doubtful expressions resolved in its favor. Northern Cheyenne Tribe v. Hollowbreast 425 U.S. 649, 48 L.Ed.2d 294 (1976); DeCoteau v. District County Court 420 U.S. 425, 43 L.Ed.2d 300, 314 (1975); McClanahan v. Arizona Tax Commission 411 U.S. 164, 36 L.Ed.2d 129 (1973); Alaska Pacific Fisheries v. United States 248 U.S. 78, 63 L.Ed. 138 (1916); Choate v. Trapp 224 U.S. 665, 56 L.Ed. 941 (1912); United States v. Celestine 215 U.S. 278, 54 L.Ed. 195 (1905); Santa Clara Pueblo v. Martinez 436 U.S. 49, 56 L.Ed.2d 106 (1978); Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982).

PROPOSITION II

TRIBES ARE NOT REQUIRED TO ADOPT THE INDIAN REORGANIZATION ACT OF 1934 IN ORDER TO TAX NON-INDIANS WITHOUT FEDERAL SUPERVISION AND APPROVAL.

None of the foregoing authorities in Proposition I, which paint with the broadest brush the fullness of the cornucopia of inherent tribal authority over persons and

property within the Indian Country jurisdiction of an Indian Tribe, contain any requirement that the tribal government be modeled in any particular form, or that tribal legislative actions be reviewed by the Secretary of the Interior in the absence of an explicit treaty provision, statute, or some other explicit provision of the internal laws of the particular Tribe involved. It has, in fact, been said that the legal history of the Indian tribes covers a longer period and a wider range of variation than the constitutional history of the colonies, the states, and the United States:

It was some time before the immigrant Columbus reached these shores, according to eminent historians, that the first Federal Constitution on the American Continent was drafted, the Gayaneshagowa, or Great Binding Law of the Five (later six) Nations (Iroquois). It was in this constitution that Americans first established the democratic principles of initiative, recall, referendum, and equal suffrage. In this constitution, also, were set

forth the ideal of the responsibility of governmental officials to the electorate, and the obligation of the present generation to future generations which we call the principle of conservation.⁴

and further:

From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of the original tribal sovereignty.

. . . . In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the Tribe.

F. Cohen, *Handbook of Federal Indian Law*, p. 122.

4. F. Cohen, *Handbook of Federal Indian Law* 128 (1942). Obviously, this constitution was not drafted in written form recognizable by the European immigrants who first contacted the League of the Five Nations. Just as obviously, neither this constitution, nor other similar constitutions or the laws of the various tribes involved were approved by any authority of the United States prior to their validity. This Constitution of the Iroquois Confederacy is still the basic instrument of government for most of the Six Nations Reservations now located within the State of New York.

Petitioner asserts that Indian Tribes not organized pursuant to the Indian Reorganization Act of 1934 (IRA) cannot tax non-Indians without federal supervision and approval. However, the Ninth Circuit Court of Appeals in Kerr-McGee Corporation v. Navajo Tribe of Indians, 731 F.2d 604, quoting from the Tenth Circuits decision in Southland Royalty Co. V Navajo Tribe of Indian, 715 F.2d 486, appropriately countered this off-beat assertion, at p. 603, by holding:

The purpose of the IRA was to enable and encourage Indian self-government. Organization under the IRA was not the only form of self-government acceptable to Congress. One of the ways in which the IRA reflects a respect for self-government was in the provision that make adoption of a constitution optional. 25 U.S.C. §476. The choice of government is in itself an act of self-government and consonant with Congressional policies.

Petitioner's fail to recognize that when Congress has intended the result Petitioner urges—that the government of an Indian tribe be required to be in a particular form, or has determined to give the President

or the Secretary of the Interior general supervisory authority over the action of a Tribe's legislative or executive branches, it has explicitly so provided. See, Act of June 7, 1897, 30 Stat. 62, 84 (Five Civilized Tribes); Act of March 3, 1901, 31 Stat. 1058, 1077 (Five Civilized Tribes); Act of June 28, 1906, 34 Stat. 539, 545 (Osage Tribe).⁵ In contrast, the plain language of the Indian Reorganization Act, 25 U.S.C. §476, imposes no requirements for the form of a tribal government, nor requires Secretarial approval of tribal ordinances whether a Tribe organizes pursuant to that, or any other act of

5. It is interesting to note that the portions of the Osage Allotment Agreement which designate the form of government for the Osage Tribe and other specifics of its governmental organization were probably enacted, not in response to any perceived inadequacies in the then extant written Constitution and laws of the Osage Tribe, but in order to return a form of self-government to the Osage Tribe after the Secretary of the Interior had unilaterally and arbitrarily abolished the Osage tribal government in a series of ultra vires actions, Logan v. Andrus 457 F. Supp 1318 (W.D. Okla 1978), actions described by federal courts in similar cases as "bureaucratic imperialism". Harjo v. Kleppe 420 F.Supp. 1110 (D.D.C. 1976); aff'd sub. nom. Harjo v. Andrus 481 F.2d 949 (D.C. Cir. 1978).

Congress, a non-Congressionally authorized written Constitution or other written laws, or continues to operate pursuant to a traditional form of government existing since time immemorial. Simply stated, neither the Indian Reorganization Act nor any other Act of Congress requires the Navajo Tribe of Indians to organize their government in any particular form.

PROPOSITION III

THERE IS NO AUTHORITY FOR THE PROPOSITION THAT THE SECRETARY OF THE INTERIOR HAS OBTAINED PLENARY AUTHORITY OVER THE EXERCISE OF TRIBAL GOVERNMENTAL AUTHORITY IN DEROGATION OF THE FEDERAL CONSTITUTION, FEDERAL ADMINISTRATIVE PROCEDURE, AND THE RIGHT TO SELF GOVERNMENT RESERVED TO THE NAVAJO TRIBE.

In an incredible series of arguments, Petitioner, Kerr-McGee Corporation raises the spectre of Indian tribal governments run amuck and invites this Honorable Court to endorse an unprecedented rule of law holding that Indian tribes, through recognized by the executive, legislative and judicial branches of the United States as

having the authority to legislate and enforce civil laws within their jurisdiction are competent only to legislate and enforce civil laws governing non-Indians when some other non-Indian person or agency gives his blessing to such laws—all in the absence of any treaty, statutory, or Constitutional requirement for such blessing. Petitioner, by legal legerdemain, requests this Court to transform government by the Tribe into government by the Secretary of the Interior.

It is black letter hornbook law that administrative officers of the Executive Department of the Federal Government have only such authority as is not in excess of statutory jurisdiction, authority, or limitations, and that any actions of an administrative officer, such as the Secretary of the Interior, will be held unlawful and set aside if found to be ultra vires, 5 U.S.C. §706(2)(C).

The Secretary of the Interior, in fact, has explicitly determined that he has no such authority respecting tribal ordinances taxing mineral production within the jurisdiction of the Tribe⁶ unless there exists either (1) a statute of Congress explicitly granting approval authority over that Tribe or the subject matter; or (2) Constitutional or statutory authority from the Tribe itself granting him the power to approve the action in question. 83 B.I.A.M. 6.6B; "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities", Bureau of Indian Affairs; Southland Royalty Company v. Navajo Tribe of Indians 715 F.2d 486 (10th Cir. 1983); Knight v. Shoshone & Arapahoe Indian Tribes 670 F.2d 900 (10th Cir. 1982);

6. "The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision." F. Cohen Handbook of Federal Indian Law 103 (1942). Petitioner is attempting to force upon the Secretary the administration and regulation of a field where (1) the Secretary has determined that he has no statutory authority to act, and (2) where the Secretary has indicated that it would be adverse to the Administration's Indian policy for him to affirmatively exercise the authority claimed for him even if it was within his discretion to do so.

Babbitt Ford, Inc. v. Navajo Indian Tribe 710 F.2d 587 (9th Cir. 1983). In its final report to the American Indian Policy Review Commission (1976), a Commission authorized by the Congress in Public Law 93-580, Task Force Two: Tribal Government, determined that the Secretary's authority to control the actions of Indian Tribes came from two sources, the trust responsibility for Indian trust property as delineated by federal statutes, and the constitutions of the Tribes themselves. The Report On Tribal Government stated at page 15:

BIA or Interior Department authority over the actions of Indian Tribal Governments grounded upon provisions found in tribal constitutions must be viewed as a matter which concerns the individual tribe and is not an issue of Federal policy. Even though the Interior Department officials were responsible for drafting the model IRA constitution and for encouraging tribes to adopt constitutions which contained the "boilerplate" provision granting authority to the Secretary of Interior, it is clear that the tribes are not required under Federal law to submit their governments to this broad range of supervisory control. In recent times, a significant number of Indian tribes have amended their constitutions to delete completely any requirement that the tribal government submit any form of tribal action to the Secretary of Interior for his review and approval. Consequently, today it remains a matter of tribal initiative whether to allow for Secretarial review and approval of tribal action through their constitution or change their law to be completely free of such tribally-conferred Federal supervision.

The Secretary's view on this subject is therefore in accord with the existing law.⁷

The Congress has explicitly directed the federal courts to limit the actions of federal agencies, including the Department of the Interior, to the authority

7. "In the case of Francis v. Francis [203 U.S. 233 (1906)] the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the 'President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed.'

The question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court in the case of Jones v. Meehan [175 U.S. 1 (1899)]. One of the questions presented by that case [arising between and resulting from a dispute between white persons holding leases and conveyances of property of the Indian decedent from his heirs] was whether inheritance of Indian land, in the absence of statute, was governed 'by the laws, usages, and customs of the Chippewa Indians' or by the rules and regulations of the Secretary of the Interior. In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department" — even though non-Indians were the claimants to the property. F. Cohen, Handbook of Federal Indian Law 102 (1942).

specifically conferred upon them by statute. In Section 706 of Title 5 of the United States Code Congress directed, in pertinent part:

The reviewing court shall —

• • • • •
(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

- • • • •
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

• • • • •

This Court has held, on more than one occasion, that prior to a federal agency having any authority to take an action it must be shown that the action is within the scope of the agency's authority, and that action taken outside the scope of explicitly delegated statutory authority is void. FPC v. Transcontinental Gas Pipe Line Corp. 423 U.S. 326, 331, 46 L.Ed.2d 533, 538 (1976); Citizens To Preserve Overton Park v. Volpe 401 U.S. 402, 415, 28 L.Ed.2d 136, 153 (1971); Leedom v. Kyne 358 U.S. 184, 188, 3 L.Ed.2d 210, 214 (1958); United States ex rel. Accardi v. Shaughnessy 347 U.S. 260, 266, 267, 98 L.Ed 681, 686 (1954); Arrow-Hart & Hegeman Electric

Company v. Federal Trade Commission 291 U.S. 587, 594, 598, 78 L.Ed 1007, 1011, 1013 (1934).

There is no cogent authority for the proposition that the Secretary of the Interior has obtained plenary authority over the exercise of tribal powers of self-government. In Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982), a case upholding the Jicarilla Apache Tribe's inherent power to tax, regulate, and exclude non-Indians, this Court in stating that the tribal ordinance in question required approval by the

Secretary prior to being effective cited the Constitution and laws of the Jicarilla Apache Tribe. It is evident that the reasoning and source of authority for Secretarial approval was the Tribal constitutional requirement that the Secretary of the Interior approve such ordinances.⁸ Also, the language of this Court in the Merrion case was

8. That this self-imposed limitation on tribal authority is purely voluntary with the Jicarilla Tribe, and not any general requirement of Federal Indian Law, note the constitutions of Tribes approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. §476, and the Oklahoma Indian Welfare Act, 25 U.S.C. §501, which by specific delegation of taxing authority or by general delegation of all inherent and statutory authority of the Tribes, vests the authority in the Tribal Legislatures to tax all persons without any requirement of Secretarial approval of the ordinances providing for such taxes: San Carlos Apache Tribe (1954), Article V, Section 1(k); Hualapai Tribe (1955), Article VI, Section 1(m); Pueblo of Laguna (1958), Article VI, Section 1(e)(4); Sac and Fox Tribes of Kansas and Nebraska (1937), Article V, Section 1(f); Apache Tribe of Oklahoma (1972 as amended through 1976) Article V; Fort Sill Apache Tribe of Oklahoma (1976 as amended through 1978) Article IV; Iowa Tribe of Kansas and Nebraska (1978) Article V, Section 1(i); Kickapoo Tribe of Kansas (1962) Article V, Section 1(f); Absentee Shawnee Tribe (1977) Article 5, Section 1; Citizen Band of Potawatomi Indians (1971) Article V, Section 2; Iowa Tribe of Oklahoma (1977) Article V, Section 2; Kickapoo Tribe of Oklahoma (1977) Article V, Section 1(a); Sac and Fox Tribe of Indians of Oklahoma (1967) Article V, Section 1.

dicta in that the tribe's constitution required Secretarial approval of its ordinances, the Secretary had in fact approved the ordinance in question, and no question was presented as to whether the Secretary had to approve the ordinance to render it valid in the absence of a tribal or congressional mandate that he do so. This statement was made in the context of answering a Commerce Clause challenge to the taxing authority of the Jicarilla Tribe.

Additionally, assumption of such powers by the Secretary of the Interior has always been condemned by the Courts and disapproved by Congress:

The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision. Cohen, Handbook of Federal Indian Law 103 (1945).

and further:

This statute [25 U.S.C. §2] was obviously not intended to vest in the newly created office of the Commissioner of Indian Affairs the power to regulate Indian conduct generally . . . The phrase 'management of all Indian affairs' clearly does not mean 'management of the affairs of Indians' any more than the phrase 'management of foreign affairs' means 'management of the affairs of foreign nations

or of foreigners.' The phrases "Indian affairs" and "Indian relations" are intended to cover the relations between the United States and the Indian tribes, which relations are commonly established either by treaty or by statute'. *Id.* at 102, and the footnote references therein.

See, also, 55 L.D. 103 (August 24, 1942)(Holding that 25 U.S.C. §2, by and of itself, did not give any direct authority to the Secretary of Interior, but that section 2 must be read in conjunction with another expressed grant of authority); Francis v. Francis 203 U.S. 233, 242, 51 L.Ed 165, 168 (1906); Morris v. Hitchcock 194 U.S. 384, 48 L.Ed 1030 (1904); Jones v. Meehan 175 U.S. 1, 29, 44 L.Ed 49, 60 (1899); Worcester v. Georgia 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); Ex Parte Crow Dog 109 U.S. 556, 27 L.Ed. 1030 (1883); Logan v. Andrus 457 F.Supp. 1318 (N.D.Okla.1978)(Secretary's attempt to abolish Osage power of self-government held void); Harjo v. Kleepe 420 F.Supp. 1110 (D.D.C. 1976)(Secretary's attempt to prevent Creek legislature from meeting stated to be "bureaucratic imperialism" and void) aff'd. sum. nom. Harjo v. Andrus 581 F.2d 949 (D.C.Cir. 1978).

The petitioner has stated that there must be some mechanism to determine when tribal actions are inconsistent with the national interests. That mechanism is now in force. The authority of congress to limit tribal powers of self-government by statute, not some implied authority for the Secretary of the Interior creating a phantasmagoria of limitations on the tribal power of self-government contrary to all prior case law, is available to affirmatively check unfair or unprincipled action's by tribal governments. Santa Clara Pueblo v. Martinez 426 U.S. 49, 56-57, 56 L.Ed.2d 106, 114 (1978); See also, Act of April 26, 1906, Chap. 1876, §28, 34 Stat. 137, 148 (1906)(this act is an example of the method congress has used to require Secretarial approval of tribal legislation, no similar act applies to the Navajo Tribe of Indians); Indian Civil Rights Act of 1968, 25 U.S.C. §1301, et. seq.(this act is an example of the method Congress has used to limit the tribe's powers of self government. However, in this act, Secretarial approval of tribal legislation was not required. See, Santa Clara Pueblo v. Martinez 426 U.S. 49, 56-57, 56 L.Ed.2d 106, 114

(1978)). Further, tribal exercise of the powers to tax, non-Indians when their conduct within the tribal jurisdiction has some effect on Indian interests has never been invalidated or limited as inconsistent with any stated national interests by a federal appellate court. Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 71 L.Ed.2d 21 (1982); Washington v. Confederated Tribes 447 U.S. 134, 65 L.Ed.2d 10 (1980); Montana v. United States 450 U.S. 544, 67 L.Ed.2d 493 (1981); Worcester v. Georgia 31 U.S. (6 Pet.) 515 , 8 L.Ed 483 (1832); 15 U.S.C.S. §§3320(a), (c)(1). In fact, in both the National Gas Policy Act of 1978, 15 U.S.C.S. §3320, and the Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. §7871, et cet., tribal taxation is explicitly recognized by the Congress. In the National Gas Policy Act, tribal severance taxes are authorized on an equal footing with state severance taxes in 1978 — four years prior to this Court confirming that Indian tribes have the authority to levy such taxes, and, in the Indian Tribal Government Tax Status Act, tribal taxes generally are recognized as eligible for deduction

for federal income tax purposes on an equal footing with state taxes without any indication of the supposed requirement that these taxes be approved by the Secretary of the Interior prior to implementation.⁹ Simply stated, if there are to be limitations imposed upon the authority of Tribal governments, it is the exclusive province of the Congress to explicitly impose those limitations, and the Congress has not seen fit to do so in this case. Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 147, 71 L.Ed.2d 21, 36 (1982); White Mountain Apache Tribe v. Bracker 448 U.S. 136, 65 L.Ed.2d 665 (1980); Santa Clara Pueblo v. Martinez 436 U.S. 49, 56 L.Ed.2d 106 (1978);

9. The Natural Gas Policy Act states in pertinent part at 15 U.S.C. §3320(c): "Definition of State severance tax. For purposes of this section, the term 'State severance tax' means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas — (1) by any State or Indian Tribe." If Congress had intended such authorized and recognized Tribal severance taxes to be approved by the Secretary of the Interior prior to becoming effective, then, under any recognized rule of statutory construction, the Congress also intended State severance taxes to be approved by the Secretary of the Interior prior to becoming effective.

United States v. Wheeler 435 U.S. 313, 55 L.Ed.2d 303 (1978); Talton v. Mayes 163 U.S. 376, 41 L.Ed 196 (1896).

Congress has, in fact, consistently opposed the exercise of such powers as petitioner Kerr-McGee here advocates for the Secretary of the Interior. As early as 1833, and continuing thereafter, the Commissioners of Indian Affairs, and the Secretary of the Interior had requested from Congress specific authority to create codes of laws for, veto the actions of, and act as magistrates for the Indian Tribes.¹⁰ The Indian Reorganization Act itself, 25 U.S.C. §§465, et. seq., was designed

10. See, Rep. Comm. Ind. Aff. 1833 p. 186 (Commissioner Herring); Rep. Comm. Ind. Aff. 1838 p. 424 (Commissioner Crawford); Extract from Report of the Secretary of the Interior, 1865, p. IV in Rep. Comm. Ind. Aff. 1865 (Interior Secretary Harlan); Rep. Comm. Ind. Aff. 1877 pp. 1-2 (Commissioner Hayt); Rep. Comm. Ind. Aff. 1886 p. XXVII (Commissioner Atkins); See, also, Rep. Comm. Ind. Aff. 1889 p. 26 (reporting the establishment of Courts of Indian Offenses in 1882 without the benefit of Congressional approval or authorization, even in light of the many previous requests for such authority), and Santa Clara Pueblo v. Martinez 436 U.S. 49, 68-69, 56 L.Ed.2d 106, 119-120 (1978) where this Court discusses another attempt by the Interior Department to obtain Congressional approval to review the governmental actions of Indian tribes — an attempt which was rejected by the Congress.

not to limit the authority of traditionally based tribal governments, but to get the Secretary of the Interior out of tribal self-government into which he had intruded by his unwarranted assumption of administrative powers. Ziontitz, After Martinez: Civil Rights Under Tribal Government, 12 Univ. Calif. Davis L. Rev. 1, 31-33 (1979); Senate Comm. on Indian Affairs, Report No. 1080, 73rd Cong., 2nd Sess., 3-4 (1934); Hearings on S. 2755 and S. 3645, Senate Comm. on Indian Affairs, 73rd Cong., 2nd Sess., pt. 2, p. 256 (1934); H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., p. 8 (1934); Morton v. Mancari 417 U.S. 535, 41 L.Ed.2d 290 (1974).

Not only is it clear that the Secretary does not claim review power over the levy and collection of tribal taxes without some specific authority to do so, but it is also clear that the Indian Tribes affected, and the Bureau

of Indian Affairs, and the Congress, and the Congressional Task Force commissioned to review Federal Indian policy, and the Interior Department's most noted scholar in the field of Indian law, and the President as explained in his Indian Policy Statement¹¹ are of the view that the Secretary of the Interior has no such inherent review authority. "[J]ust as established practice may shed light on the extent of power [granted to a federal agency], so the want of assertion of power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred."

11. Indeed, The President's Commission on Indian Reservation Economies, in its Report and Recommendations to the President of the United States dated November 30, 1984, at page 16 of Part Two, identifies jurisdictional disputes between Tribes and State and local governments as the second most pervasive obstacle to the development of private sector business and industry within the Indian Country. The President's Commission, at page 34 of Part One of its report, and in other statements scattered throughout, has recommended that federal law be returned to Mr. Chief Justice Marshall's position that the laws of a State can have no force within the Indian Country, and that the return be prompted by legislation if necessary. This position appears to be four-square with the policy of Congress, See, Indian Self-Determination Act, 25 U.S.C. §§450, 450a, the Indian Child Welfare Act, 25 U.S.C. §§1901 et. seq. and particularly §1911(a)(b) and the other recent legislation cited herein.

FTC v. Bunte Brothers 312 U.S. 349, 85 L.Ed 881 (1941); BankAmerica Corp. v. United States ___ U.S. ___, 76 L.Ed.2d 456 (1983). In the absence of a specific statutory grant of authority from the Congress, or a grant of authority arising from the internal laws of the Tribe involved, the Secretary of the Interior has no authority to require approval of tribal government actions through his office prior to their validity.

CONCLUSION

In a myriad of cases throughout the years, this Honorable Court has determined that the Treaty guarantees to self-government, Treaty with the Navajo, June 1, 1868, Article 2, 15 Stat. 667, and the interests of the Tribe and the Federal government in securing to the Navajo Tribe its ability to exercise its sovereign functions is so pervasive as to pre-empt State taxes upon all legal entities doing business within the Indian Country subject to the jurisdiction of the Navajo Tribe of Indians, and to require that those persons resort to the tribal courts established by legislation of the Navajo Tribal Council

in resolving disputes between themselves and members of the Navajo Tribe which arise within the tribal jurisdiction. Ramah Navajo School Bd. v. Bureau of Revenue 458 U.S. 832, 73 L.Ed.2d 1174 (1982); Warren Trading Post v. Arizona Tax Commission 380 U.S. 685, 14 L.Ed.2d 165 (1965); McClanahan v. Arizona State Tax Commission 411 U.S. 164, 36 L.Ed.2d 129 (1973); Williams v. Lee 358 U.S. 217, 3 L.Ed.2d 251 (1959).

Petitioner Kerr-McGee invites this Court to create a new rule of administrative law exclusively for Indian Tribes vesting general supervisory authority over tribal governments and tribal legislation in the Secretary of the Interior. If the Congress desires that tribal government and legislation be subject to the approval of the Secretary of the Interior, it is clear that the Congress knows how to impose such a requirement upon the Tribe. United States v. McGowan 302 U.S. 535 (1938); Blue Jacket v. Commissioners 72 U.S.(5 Wall.) 737, 757, 18 L.Ed 667, 673 (1867); Yellow Beaver v. Commissioners 72 U.S. (5 Wall.) 757, 18 L.Ed. 673 (1867); United States v. Nice 241 U.S. 591, 598, 60 L.Ed 1192, 1195 (1916).

See also, National City Bank v. Republic of China 348

U.S. 356, 358, 99 L.Ed 389, 395 (1955).

This Honorable Court is urged to hold that the Navajo taxes at issue here are valid and enforceable.

Respectfully Submitted

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Oklahoma

December 26, 1984

No. 84-68

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

KERR-McGEE CORPORATION,
PETITIONER,
-vs-
NAVAJO TRIBE OF INDIANS,
RESPONDENTS.

AFFIDAVIT OF SERVICE

Cleveland County }
 }
State of Oklahoma } ss.

F. BROWNING PIPESTEM, being first duly sworn,
deposes and says:

1. That he is an active member of the Bar of
this Court, and that he is an attorney for the amicus
curiae Sac and Fox Tribe of Indians of Oklahoma.

2. That the Brief of Amicus Curiae and Motion
to File Brief of Amicus Curiae to which this Certificate

is attached has been served upon all counsel of record for the parties in this cause in accordance with the provision of Rule 28 of the Rules of this Court by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed this 26th day of December, 1984, to each of:

Alvin H. Shrago, Esq.
EVANS, KITCHEL & JENCKES, P.C.
2600 North Central Avenue
Phoenix, Arizona 85004-3099

Elizabeth Bernstein, Esq.
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Drawer 2010
Window Rock, Arizona 86515

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, forty copies of this Brief of Amicus Curiae and the Motion to file this Brief of Amicus Curiae which is bound at the beginning of this document, were mailed first class postage prepaid properly addressed to the Clerk of the

Supreme Court of the United States on this 26th day of December, 1984, which is within the time allowed for filing this brief under the Rules and orders of this Court.

s/F. Browning Pipestem
F. Browning Pipestem

Subscribed and sworn to before me this 26th day of December, 1984.

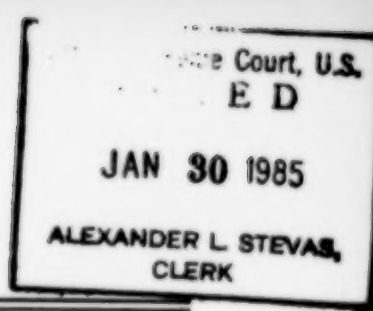
[Seal]

s/William Giessman
Notary Public

My Commission Expires:

April 8, 1986

19
No. 84-68



In The
Supreme Court of the United States
October Term, 1984

— o —
KERR-McGEE CORPORATION,
Petitioner,
v.

THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

— o —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

— o —
REPLY BRIEF FOR THE PETITIONER

— o —
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| <i>To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. On Indian Affairs</i> , 73d Cong., 2d Sess. (1934) | 10 |
| Treaty of 1868, 15 Stat. 667 | 12 |
| 78 Cong. Rec. 11,739 (1934) | 9 |
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| 7 N.T.C. § 323(1) | 4 |
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I. Introduction

At issue in this case is “the administrative process established by Congress” and explicitly relied upon by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 (1982), that Indian tribes must follow in taxing non-members. Such a procedure, which not even the respondents claim to be unfair to them, is simply part of the supervision that the United States Government has exercised over Indian affairs since the birth of this Nation.

Neither the respondents nor the United States dispute that intercourse between Indians and non-Indians has traditionally been supervised by the Secretary of the Interior. Nor do they dispute that petitioner could not have even commenced its oil and gas operations on the Navajo Reservation without approval from the Secretary.¹ Yet the respondents and the United States advance the notion that all of a sudden Indian tribes may unilaterally tax the very non-Indian oil and gas operations for which Congress explicitly required both initial Secretarial approval and continued Secretarial supervision. 25 U.S.C. § 396a and § 396d.

This notion is based on the erroneous premise that existence of an inherent tribal power to tax means that such a power can be exercised unconstrained by any limitations except those imposed by a tribe upon itself. And since the Navajo Tribe (so the argument goes) has not required its tax ordinances to be approved by the Secretary, the taxes are valid and effective without Secretarial approval. Of course, in structuring this argument, both the respondents and the United States have not even

¹In fact, the respondents point out that the Secretary’s supervision of tribal affairs even includes “approving the expenditure of tribal funds.” *Respondents’ Brief* at 27.

bothered to cite, much less to address, *Rice v. Rehner*, — U.S. —, 77 L.Ed.2d 961 (1983), where this Court rejected the notion that Indians are “super-citizens” free from all but “self-imposed regulations.” *Id.* at —, 77 L.Ed.2d at 979. See also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 165 (1980) (Brennan, J., dissenting) (“Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.”).

Even more incredible, however, is the almost total disregard that the respondents and the United States have shown for *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). While they are quick to cite *Merrion* for the proposition that Indian tribes have inherent power to tax non-Indians, they persistently avoid the holding in *Merrion* that an Indian tribe cannot tax non-members without first obtaining approval from the Secretary.² The respondents contend that “the need for Secretarial approval in *Merrion* arose from the provisions of tribal law.” *Respondents’ Brief* at 11, 25 (emphasis in original). The United States contends that “The requirement of Secretarial approval is not, however, a result fairly attributed to Congress . . . [but] [r]ather . . . a discretionary decision of the Bureau of Indian Affairs.” *United States’ Brief* at 11. These assertions fly flagrantly in the face of the explicit holding

²The *Merrion* Court itself distinguished between the existence and the exercise of an inherent power to tax. Justice Marshall emphasized that while “neither the Tribe’s Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes,” 455 U.S. at 148 n.14, an amendment to the tribal Constitution authorizing exercise of the power was “the critical event necessary to effectuate the tax.” *Id.* (emphasis by the Court). The Court also explained that Secretarial approval is a constraint that “minimize[s] potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner. . . .” *Id.* at 141 (emphasis added).

in *Merrion* that Secretarial approval is an integral part of “the administrative process established by Congress to monitor such exercises of tribal authority.” 455 U.S. at 141 (emphasis added).

The United States and the respondents altogether ignore the explanation in *Merrion* that Secretarial approval is an additional constraint that:

[M]inimize[s] potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure[s] that any exercise of the tribal power to tax will be consistent with national policies.

455 U.S. at 155. Indeed, such federal supervision is essential since Indian tribes are not bound by the Bill of Rights and the fourteenth amendment and since the constraints on tribal power theoretically³ set forth in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.*, are incapable

³The constraints are only theoretical since they cannot be enforced by private litigants against any tribal institution, not even a tribal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Thus, to relegate such rights for resolution in a tribal court would require an assumption of tribal court cooperation in correctly interpreting and applying federal law. This Court has previously refused to premise its decisions on such assumptions of cooperation, even in the context of courts against which Constitutional constraints are enforceable. *Arizona v. San Carlos Apache Tribe*, — U.S. —, 77 L.Ed.2d 837, 857 (1983) (rejecting arguments of the United States and the Navajos that “assume a cooperative attitude on the part of state courts . . . which is neither legally required nor realistically always to be expected.”). See also *Cohens v. Virginia*, 5 U.S. (6 Wheat.) 264, 386 (1821) (explaining that the judicial power of the United States in article III of the Constitution must be respected because “It would be hazarding too much to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals.”); *Martin v. Hunter’s Lessee*, 4 U.S. (1 Wheat.) 304, 331 (1816).

There is no basis for assuming that tribal courts will cooperate in correctly interpreting and applying federal law. In

(Continued on next page)

of enforcement by anyone other than the Secretary of Interior.⁴

The enormous potential for mischief if Indian tribes are not required to follow the administrative process established by Congress to monitor exercises of tribal authority is illustrated by the Ninth Circuit's recent decision in *Moapa Band of Paiute Indians v. United States Department of Interior*, 747 F.2d 563 (9th Cir. 1984), which both the United States and the respondents are content to ignore. In that case, the Court of Appeals upheld the Secretary's refusal to approve an Indian tribe's ordinance encouraging prostitution on the reservation because the tribal constitution "empowers" the Secretary to rescind

(Continued from previous page)

fact, the Presidential Commission on Indian Reservation Economies recently acknowledged that "[T]he failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law." *Report and Recommendations of the Presidential Commission on Indian Reservation Economies* at 25 (November 1984). See also Getches, Rosenfelt & Wilkinson, *Federal Indian Law Cases and Materials* at 319-321 (1979); Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not"*, 62 A.B.A.J. 1002 (1976). Such political interference is patently obvious in the case of the Navajo Tribal Council, which created the "Supreme Judicial Council" to review all decisions of the Navajo Courts in which a tribal council resolution has been held invalid. 7 N.T.C. § 323(1). Five of the seven voting members of the Supreme Judicial Council are members of the very Tribal Council whose resolution is at issue. 7 N.T.C. § 322. This Court has consistently disapproved of judicial systems that do not permit decision-making by impartial, disinterested judges. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

⁴For example, on December 5, 1983, the Department of the Interior invalidated the Hopi Tribe's proposed Coal Severance Tax on the grounds, among others, that it violated the due process provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8). (The Assistant Secretary's letter disapproving this tax is reproduced as Appendix AA at the end of this reply brief.)

an ordinance for any cause. *Id.* at 565.⁵ Under the notion advanced by the United States and the respondents in the present case, the Moapa Tribe could proceed with its prostitution ventures if it did not have a constitution at all or if it amended its constitution to delete the Secretarial oversight provisions.⁶ In fact, the United States reveals that "the Department [of the Interior] today encourages the elimination of the traditional Secretarial review clauses in tribal constitutions", *United States' Brief* at 5-6, and admits that Secretarial approval clauses in several tribal constitutions have already been removed. *Id.* at 16-17.

The Interior Department does not have any claimed "statutory discretion" (*United States' Brief* at 2) to disregard "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion*, 455 U.S. at 155.

⁵The notion that the Secretary of the Interior obtains his authority from Indian tribes, which may or may not "empower" him to supervise Indian affairs, is absurd. The Secretary is an official of the United States and is empowered by the Congress of the United States to supervise Indian affairs. See *Roger St. Pierre v. Commissioner of Indian Affairs*, 89 I.D. 132, 151 (1982) ("Tribal constitutions cannot limit the power of the United States, a superior sovereign, any more than a state constitution could.").

⁶On this point, the Government has taken inconsistent positions. On the one hand, it urges this Court to defer to "the continuing administrative view that Congress never directed the Secretary to insist upon review of tax ordinances", *United States' Brief* at 18—notwithstanding this Court's explicit recognition of the IRA as "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion*, 455 U.S. at 155. On the other hand, the Government asserts that the Bureau of Indian Affairs has "power independent of the I.R.A. and the Tribe's constitution to screen and veto some or all tribal enactments." *United States' Brief* at 18. In what Act of Congress has the Bureau of Indian Affairs been given such broad power independent of the IRA to disregard the "administrative process established by Congress to monitor such exercises of tribal authority", *Merrion*, 455 U.S. at 155, by screening and vetoing tribal ordinances at the untrameled whim of political appointees?

II. The Respondents And The United States Urge This Court To Disregard The Legislative History And Early Interpretations Of The Indian Reorganization Act Of 1934.

Relying on sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476 and 477 (hereinafter "IRA"), the *Merrion* Court explained that "Here, Congress has affirmatively acted by providing a series of federal checkpoints that *must* be cleared before a tribal tax can take effect." 455 U.S. at 155 (emphasis added). These checkpoints—amendment of the Tribal Constitution to announce tribal intention to tax nonmembers and Secretarial approval of the tax itself—are integral parts of "the administrative process established by Congress to monitor such exercises of tribal authority." *Id.*

The respondents' efforts to avoid the requirement of Secretarial approval confirmed in *Merrion* are premised on extraordinary self-contradiction and oversight. They argue that the IRA was not intended "to generate distinctions between tribes which did and did not wish to reorganize", *Respondents' Brief* at 7, and that the purpose of the IRA "was not to shape tribal government or make it more amenable to federal control." *Id.* at 8. Yet, they seek this Court's imprimatur on a distinction that makes those tribes which organized under the IRA more amenable to federal control than those tribes which rejected the IRA. The United States has conceded that it "may seem odd that . . . most of the Tribes that accepted the I.R.A. are . . . less independent." *United States' Brief* at 16. It is both odd and illogical. It is also contrary to the IRA's legislative history and its contemporaneous interpretation by the Bureau of Indian Affairs.

The United States does not dispute the correctness of the legislative history of the IRA cited by petitioner,⁷ which was based primarily on the statements made by both the Senate and the House sponsors as well as the author of the legislation, Indian Commissioner John Collier, himself. *See Petitioner's Brief* at 23-32. These statements are entitled to substantial weight, as this Court has repeatedly recognized. *E.g., Lewis v. United States*, 455 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Federal Energy Administration v. Algonquin Sng, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute.").

In fact, the United States readily concedes the "prevailing administrative view in the mid-1930s, and continuing for some time thereafter, to the effect that tribal taxation of non-Indians . . . generally *ought* to be supervised by the Bureau of Indian Affairs." *United States' Brief* at 15 (emphasis in original). As this Court has repeatedly recognized, "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." *Miller v. Youakim*, 400 U.S. 125, 144 (1979). *See also Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, — U.S. —, —, 81 L.Ed.2d 301, 310 (1984) (acknowledging the deference due to "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."); *United States v. Vogel*

⁷Indeed, the Interior Board of Indian Appeals cited much of the same legislative history in *Roger St. Pierre v. Commissioner of Indian Affairs*, 89 I.D. 132, 144-45 (1982).

Fertilizer Co., 455 U.S. 16, 31 (1982) (“[W]e necessarily attach ‘great weight’ to agency representations to Congress when the administrators ‘participated in drafting and directly made known their views to Congress in committee hearings.’”).

Incredibly, the United States suggests that instead of respecting the contemporaneous administrative interpretation of the IRA, this Court should blatantly disregard statements of Indian Commissioner Collier and others as “exaggerated representations occasionally . . . made by zealous officials of the Bureau of Indian Affairs. . . .” *United States’ Brief* at 15. Moreover, the United States admits that “without any change in statutory law”, *Id.* at 16, the Bureau of Indian Affairs in recent years has disavowed its role of reviewing and approving tribal tax ordinances. There is no basis whatsoever for this curious invitation to repudiate the legislative history and immediate post-enactment administrative interpretations with which the Government does not presently agree.⁸ To the contrary, as this Court admonished in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), “We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency.” *Id.* at 143. Indeed, it is truly astonishing that the United States again attempts precisely what this Court rejected less than two years ago:

⁸When the Government finds legislative history and initial administrative interpretations of Indian statutes to its liking, it forcefully argues for respect and deference from this Court. See *Brief for the United States* at 17-23, *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, No. 84-262 (involving an Indian statute enacted ten years before the IRA); and *Brief for the United States* at 19-28, *State of Montana v. Blackfeet Tribe*, No. 83-2161 (involving an Indian statute enacted four years after the IRA).

Although administrative interpretation changed in 1971, . . . it is clear that the early interpretation by the Bureau of Indian Affairs favors the [petitioner’s] position. As that early position is consistent with the view of Commissioner Myer, whose Bureau revised HR 1055, it is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary.

Rice v. Rehner, — U.S. —, —, 77 L.Ed.2d 961, 977 n.13 (1983).

The respondents contend that the IRA was not designed for utilization by the Navajos,⁹ but instead for the “rebuilding of atrophied tribal governments.”¹⁰ *Respondents’ Brief* at 14. On the contrary, the principal author of the IRA, Commissioner Collier, explained that the IRA was specifically intended to be applicable to the Navajos:

This would allow the Navajo Indians, if they wanted to, to set up a community self-governing affair, and at once or gradually broaden its sphere until it became like a complete town government.

⁹The suggestion that the Navajos may have rejected the IRA because they already had a “functioning government”, *Respondents’ Brief* at 13, is belied by the November 24, 1936 Resolution of the Navajo Tribal Council, which explicitly recognized that the “sole purpose” for which the Navajo Tribal Council had been organized was that of “making oil and gas leases in behalf of the tribe” and that the authority of the Council to deal with other matters was “inadequate”. See *Petitioner’s Brief App. A* at 1.

¹⁰Their only “support” for this assertion is a mischaracterization of a remark made by Representative Hastings of Oklahoma, 78 Cong. Rec. 11,739 (1934), an opponent of the IRA who decided to support the IRA only after the Oklahoma Indians were excluded from its coverage. See 25 U.S.C. § 473. Representative Hastings never said that some tribes still retained a “functioning” government as respondents would have this Court believe. *Respondents’ Brief* at 13. Rather, he said that “Some of the Indian tribes in the western states retain some form of Indian government, as a council or business committee, with authority to make representations on behalf of their respective tribes.” 78 Cong. Rec. 11,739 (1934) (emphasis added).

To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. On Indian Affairs, 73d Cong., 2d Sess. 68 (1934). See also Commissioner Collier's comments and explanations at pages 70 and 96 of the Senate Hearings. Indeed, Senator Wheeler, the sponsor of the IRA in the Senate, declared that "I thought it [the IRA] would work among the Navajos and the Indians in New Mexico and Arizona if it would work any place." *Id.* at 145. And Commissioner Collier explained in his April 5, 1934 letter to the Navajo Tribal Council and the Navajos that the Navajos should "give a strong expression . . . urging Congress to enact the Wheeler-Howard Bill [because] . . . the Navajos . . . need the Wheeler-Howard Bill." See *Petitioner's Brief App. C* at 5.¹¹ The respondents contend that these statements should be disregarded because they were made before the Wheeler-Howard bill was revised to make the tribal self-government provisions optional. *Respondents' Brief* at 15 n.9. This is incorrect. Even the original version of the bill permitted any tribe to reject the charter to be issued by the Secretary. H.R. 7902, 73d Cong., 2d Sess., Title 1 — Indian Self-Government, § 2, reprinted in *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 1-2 (1934)*. In addition, Commissioner Collier explained on the very date of enactment that "The essentials of the Wheeler-Howard bill, as originally introduced, are con-

¹¹The Navajo Tribal Chairman expressed his tribe's support for the IRA and urged Congress to enact it. See April 12, 1934 letter from Thomas P. Dodge to Representative Edgar Howard, reprinted in *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 405 (1934)*.

tained in the House and Senate drafts as reported by the committees of these bodies." Letter dated June 15, 1934, from Commissioner Collier to Representative Frear, reprinted in 78 Cong. Rec. 11,743 (1934). Immediately preceding the House vote on the bill, Representative Frear explained that:

[T]he bill in its earlier form as introduced had the same principles as the bill now awaiting a vote. What have been changed are the details and the mechanisms of the bill, but not the principles of the bill, and that, I understand, is why the President, by personal letter, Secretary Ickes, and Indian Commissioner Collier are urging the pending bill just as earnestly as they favored the original draft.

78 Cong. Rec. 11,743 (1934).

The respondents point to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*, as "evidence" that current Congressional objectives are to strengthen tribal governments by eliminating federal supervision and control irrespective of whether a tribe is organized or unorganized under the IRA.¹² *Respondents' Brief* at 2, 19. To the contrary, both of these later Acts of Congress provide not only for additional ties between Indian tribes and the Secretary of the Interior, but also for continued oversight responsibilities on the part of the Secretary of the Interior. For example, 25 U.S.C. § 450m specifically empowers the Secretary to rescind a contract or grant agreement and to assume full control over the program, activity or service involved

¹²Of course, respondents do not dare suggest that the IRA—which some amici have described as "one of the most important pieces of Indian legislation in American history", *Brief of Amici Curiae Shoshone Indian Tribe, et al.* at 13—has been repealed by any newer legislation.

whenever the "Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons. . . ." The Indian Financing Act of 1974 is replete with provisions setting forth extensive Secretarial supervision over loans and loan guarantees to Indian tribes — including the power to "cancel, adjust, compromise, or reduce the amount of any loan or any portion thereof . . . when such action would, in his [the Secretary's] judgment, be in the best interests of the United States." 25 U.S.C. § 1465. See also 25 U.S.C. §§ 1461, 1463, 1466, 1469, 1482, 1483, 1484, 1496 and 1524. In short, these statutes illustrate that in recent years the Congress has seen fit to continue the traditional federal supervision over both organized tribes and unorganized tribes.

There is no merit to the respondents' attempt to explain their refusal to adopt a Constitution under the IRA on the asserted belief that the Treaty of 1868, 15 Stat. 667, protected their right of self-government.¹³ *Respondents' Brief* at 16. None of the publications cited by respondents discloses any such "belief" on the part of the Navajos. To the contrary, if the Navajos "believed" that

¹³The respondents do not explain what treaty provision guarantees them the right to exercise powers of self-government free of federal supervision. To the contrary, Articles I, IV, V, VII and VIII of the Treaty of 1868 require extensive involvement of the Commissioner of Indian Affairs in the affairs of the Navajos. In fact, the day before the treaty was executed, the agent for the Navajo Indians recommended that a reservation be set aside for the Navajos so that "their agent can keep an eye upon them and their acts and provide for their necessities." Letter dated May 30, 1868 from Theodore H. Dodd to Lt. Gen. W.T. Sherman and Col. S.F. Tappan, reprinted in *Treaty Between the United States of America and the Navajo Tribe of Indians* 13, 15 (KC Publications; Flagstaff, Az. 1968) (Library of Congress 68-29989).

their self-government was guaranteed by their treaty, they would have had no reason less than two years after their rejection of the IRA in 1935 to petition Congress for "The granting of self-government to the Navajo people by a gradual, orderly, and systematic advance" *Survey of Conditions of Indians in the United States: Hearings on S.858 Before the Senate Comm. on Indian Affairs*, 76th Cong., 1st Sess. 20,915 (1937). Similarly, there would have been no need for the Congress to have offered the Navajos a second opportunity to organize under section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636, if this right was already available under the treaty.¹⁴ See *United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980) (Acknowledging as to rejection of the IRA that "If the Tribes wish to be relieved from the effects of their negative vote, they must seek such relief from Congress.").

III. There Is No Judicial Authority That Exempts Unorganized Tribes From Federal Supervision.

Both the Government and the respondents have mis-cited judicial authority to support their claim that Secretarial approval of tribal tax ordinances is unnecessary. Although they cite *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611 (1983), a hunting and fishing rights case, for the proposition that encouraging tribal

¹⁴In addressing this second Congressional invitation for the Navajos to adopt a constitution, the Solicitor again confirmed the role of Secretarial approval in his June 21, 1954 opinion:

Under that language [set forth in 25 U.S.C. § 636], the powers which the tribe may exercise, with Secretarial approval, are first those powers which are vested in the tribe "by existing law."

II *Opinions of the Solicitor of the Interior Relating to Indian Affairs* 1641, 1642 (emphasis added).

self-sufficiency is a Congressional objective (*Respondents' Brief* at 11; *United States' Brief* at 1-2), they overlook this Court's unanimous holdings in that case that "Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources" (— U.S. at —, 76 L.Ed.2d at 624) and that "[F]ederal law requires the Secretary to review each of the Tribe's hunting and fishing ordinances." *Id.* at —, 76 L.Ed.2d at 623 (emphasis added). Similarly, although they cite *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), for the proposition that non-IRA tribes may tax non-Indians (*Respondents' Brief* at 14, 17; *United States' Brief* at 25), they overlook the fact that all of the tribes involved in that case had adopted tribal Constitutions and had obtained specific Secretarial approval of the taxes. 447 U.S. at 143 n.11, 144. This, of course, fulfilled "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion*, 455 U.S. at 155.

Incredibly, the United States seeks to distinguish the very judicial authority on which this Court relied in *Merrion* to uphold the federally approved severance tax of the Jicarilla Apache Tribe.¹⁵ It now contends that these cases are limited to "the special case of the Five Civilized Tribes [of Oklahoma]", *United States' Brief* at 10, even though it cited these same cases to this Court in *Merrion* for the proposition that Indian tribes everywhere have the inherent power to tax. *Brief for the United States* at 9-10, *Merrion v. Jicarilla Apache Tribe*, No. 80-11. And of course, this Court in *Merrion* analyzed these cases at

¹⁵*Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 Fed. 947 (9th Cir. 1905), *app. dismissed*, 203 U.S. 599 (1906); and *Maxey v. Wright*, 54 S.W. 807 (Ct.App.Ind.Terr.), *aff'd*, 105 Fed. 1003 (8th Cir. 1900).

great length before citing them as authority for the proposition that all Indian tribes have inherent power to tax. 455 U.S. at 141-144. Unless this Court is willing to revisit *Merrion*,¹⁶ it is too late in the day for the United States to suggest that the early Oklahoma cases are of limited application.

Respondents cite *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), for the mistaken proposition that this Court has "recognized" that the Constitution of the Santa Clara Pueblo did not require Secretarial approval of tribal ordinances. *Respondents' Brief* at 17. To the contrary, Article IV, Section 1, paragraph 5, of the Constitution of the Pueblo of Santa Clara explicitly provides "That any ordinance which affects persons who are not members of the pueblo shall not take effect until it has been approved by the Secretary of the Interior or some officer designated by him." IV G. Fay, *Charters, Constitutions and By-laws of the Indian Tribes of North America* 85, 87 (1967).

The respondents cite *United States v. Wheeler*, 435 U.S. 313 (1978), and *Williams v. Lee*, 358 U.S. 217 (1959), for the proposition that this Court has "recognized" the Navajo Tribe's governmental powers. *Respondents' Brief* at 8, 12, 20, 23 and 24. Neither of these cases, however, suggested that the Navajo Tribal Council may exercise its power without Secretarial approval. To the contrary, in *Wheeler* this Court explicitly observed that "the present

¹⁶In the event that the Oklahoma cases on which the *Merrion* Court relied were now held to be limited to the Five Civilized Tribes of Oklahoma, the holding in *Merrion* that all Indian tribes have an inherent power to tax would be based on inapposite authority. In addition, any finding that the Navajos have inherent power to tax would be precluded by the undisputed historical facts (1) that the Navajo Tribe never had any history of tribal self-government, much less any history of taxing or exerting other forms of coercive governmental authority (*Petitioner's Brief* at 26 n.17), and (2) that its government was created by federal regulations promulgated by the Secretary of the Interior (*Petitioner's Brief* at 25-26).

[Navajo] Tribal Code was approved by the Secretary of the Interior *before becoming effective.*" 435 U.S. at 327 (emphasis added). In *Williams*, this Court had explained that "To assure adequate government of the Indian tribes it [Congress] enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs." 358 U.S. at 220. Indeed, the Navajo Courts of Indian Offenses to which the *Williams* Court referred were not tribal courts at all, but rather were courts established and maintained by the Bureau of Indian Affairs.¹⁷ 22 Fed. Reg. 10516 (December 24, 1957). The Navajo Tribe did not promulgate its own law and order code until after *Williams* had been decided, and that code was approved by the Secretary of the Interior on February 11, 1959. *Oliver v. Udall*, 306 F.2d 819, 821-822 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963).

In conclusion, each of the above cases cited by respondents supports the requirement of Secretarial approval for the Navajo tribal taxes at issue in this case.

IV. Unorganized Tribes Cannot Supersede Secretarial Supervision Of Oil And Gas Leases.

Both the United States and the respondents vigorously dispute that tribal taxation of oil and gas operations

¹⁷This Court has specifically recognized the difference between "tribal courts" and "CFR Courts" operating under the Code of Federal Regulations, 25 C.F.R. § 11.1 *et seq.*" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978). See also *United States v. Clapox*, 35 F. 575 (D.Or. 1888). In the preamble to Resolution No. CO-69-58, reprinted in *Navajo Tribal Code*, Vol. II, p. 277 (1978), the Navajo Tribal Council acknowledged that its earlier resolutions attempting to appoint tribal judges "were disapproved by a former Commissioner of Indian Affairs, Dillon S. Myer, in a letter of March 3, 1953 (Law and Order 879-53, 880-53), holding that judges on the Navajo Reservation are not tribal judges, but are judges of courts established by the Department of the Interior, and that their authority to act is derived from regulations of the Department of the Interior. . . ."

by unorganized tribes has been superseded by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.*, and the regulations promulgated thereunder, 25 C.F.R. Part 211. *United States' Brief* at 21-24; *Respondents' Brief* at 31-46. However, neither has bothered even to cite, much less to address, the judicial authority—*Kennerly v. District Court*, 400 U.S. 423 (1971)—upon which petitioner has relied. And neither has even attempted to explain how "harmonization" between the Mineral Leasing Act of 1938 and the IRA is achieved by allowing both the Secretary and unorganized tribes to ignore "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion*, 435 U.S. at 155.

Rather, they attempt to respond to petitioner's argument only after mischaracterizing it. For example, the respondents claim that 25 U.S.C. § 396d merely "authorizes Secretarial regulation of lease operations." *Respondents' Brief* at 32. To the contrary, this section *requires* Secretarial regulation and further requires that all operations be subject to that Secretarial regulation. In fact, the mandate in 25 U.S.C. § 396d is far stronger than the authorization in 25 U.S.C. § 261 for the Commissioner of Indian Affairs "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Yet, the Solicitor has previously concluded¹⁸ that this authority on the part of the BIA in

¹⁸The United States now argues that the Solicitor's Opinion was wrong. *United States' Brief* at 19-21. It is simply astounding how the United States can dispute the correctness of the very Solicitor's Opinion on *Powers of Indian Tribes*, 55 I.D. 14 (1934), on which this Court relied in *Merrion*. 435 U.S. at 139. Again, the argument is apparently that this Court should respect and defer to contemporaneous administrative interpretations that the United States finds to its liking, but it should ignore and disregard those contemporaneous administrative interpretations that the United States does not now like. See footnote 8 *ante*.

the context of Indian traders means that "an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the commissioner of Indian Affairs so to do." *Powers of Indian Tribes*, 55 I.D. 14, 48 (1934) reprinted in 1 *Opinions of the Solicitor of the Interior Relating to Indian Affairs* 445, 466. Given the even greater Congressional mandate of Secretarial supervision and regulation over oil and gas leases enacted four years later, Secretarial approval over tribal taxation is more compelling in the case of oil and gas leases than in the case of Indian traders.

Both the United States and the respondents challenge the Secretary's interpretation and implementation in 25 C.F.R. § 211.29 of the distinction Congress drew in 25 U.S.C. § 396b between organized and unorganized tribes.¹⁹ The United States contends that "there is no reason to suppose the Court [in *Merrion*] considered these provisions critical." *United States' Brief* at 23 n.21. The respondents challenge the scope of 25 C.F.R. § 211.29 as being "obviously broader than the proviso in [25 U.S.C. § 396b]" (*Respondents' Brief* at 35 n.16), and suggest that it is just "an exercise of the Secretary's own regulatory discretion." *Id.* There is no basis for these assertions. Indeed, respondents' attempt to rely on 25 C.F.R. § 11.1(e) is misplaced, for that regulation requires tribal ordinances to be approved by the Secretary of the Interior before they can supersede Secretarial provisions. In short, both the United States and the respondents ask this Court to invalidate the Secretary's own interpretation in 25 C.F.R. § 211.29, which permits only organized tribes in accord-

¹⁹Elsewhere, the respondents inscrutably urge that "The Secretary's interpretation of the Act is entitled to great weight. . . ." *Respondents' Brief* at 41 n.19.

ance with their tribal constitutions to supersede Secretarial regulation of oil and gas leases.

There is little dispute that the taxes interfere with the Secretary's regulation of oil and gas leases.²⁰ Even a novice in semantics can easily appreciate that the Secretary's regulations on lease cancellation are circumvented by the tax provisions that, according to respondents, call for exclusion from the reservation or suspension of rights to do business. *Respondent's Brief* at 43 n.21. Nor is it difficult to appreciate that the Secretary's economic supervision and oversight responsibilities are disrupted by the claimed unilateral right of the Navajo Tribe to determine at what rate it will tax in any given year.

In short, if Indian tribes are permitted unilaterally to circumvent the scheme of both initial and continuing Secretarial supervision over oil and gas leases required by the Congress in 25 U.S.C. § 396d, then no lease with an Indian tribe is worth the paper on which it is written. The ineluctable result is that the very purpose of the Mineral Leasing Act of 1938—to maximize tribal revenues through the leasing of mineralized lands—will be frustrated since few, if any, responsible companies will commit to substantial capital investments on the economic terms of a negotiated lease that can be unilaterally changed by the other party without any limitation whatsoever. *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir.), cert. denied, — U.S. —, as reprinted in 52 U.S.L.W. 3461 (1983).

²⁰The respondents err in their assertion that "the Secretary has determined that nothing in his regulations conflicts with tribal tax laws." *Respondents' Brief* at 36 n.16.. The Secretary has never even analyzed the Navajo Tribe's Business Activity Tax and Possessory Interest Tax. Indeed, the respondents acknowledge elsewhere in their brief that the taxes at issue in this litigation are not covered by the review process set forth in the Secretary's "guidelines". *Id.* at 28-29.

CONCLUSION

The constitutional form of government, which prevents the unlimited exercise of sovereign power, has made this Nation the envy of the modern world. There could be no greater irony than to fashion a new rule of law that permits absolutely unlimited exercise of governmental powers on millions of square miles of land owned in fee by the United States itself.

The Ninth Circuit has eliminated federal supervision and control precisely where it is most urgently needed. The decision below trivializes this Court's decision in *Merrion v. Jicarilla Apache Tribe*, trivializes the Indian Reorganization Act of 1934 and disregards the traditional federal supervision over intercourse between Indians and non-Indians that the Congress explicitly continued in 25 U.S.C. § 396d.

The Ninth Circuit's decision below must be reversed.
January 30, 1985

Respectfully submitted,

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APPENDIX AA

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

December 5, 1983

**CERTIFIED MAIL—RETURN RECEIPT
REQUESTED**

Ivan Sidney, Jr.
Tribal Chairman, Hopi Tribe
P.O. Box 123
Oraibi, Arizona 86039

Dear Mr. Sidney:

This letter constitutes my decision to veto Hopi Coal Severance License Fee Ordinance No. 38, enacted by the Hopi Tribal Council on September 7, 1983. Although in this instance, I am required by the Guidelines for Review of Tribal Ordinances Imposing Taxes on Mineral Activities to veto a tribal severance tax, I remain committed to encouraging tribes to exercise their taxing powers within their legal authority to do so. I am also committed, of course, to assisting the Hopi Tribe in securing maximum return from production of its mineral resources, and I therefore offer my services and those of my staff toward achieving that goal.

The Guidelines mandate disapproval of an ordinance which violates federal law. By memorandum of December 5, 1983 (copy enclosed), the Solicitor has advised me that Hopi Ordinance 38 violates federal law, specifically, the Navajo and Hopi Settlement Act and the due process provision of the Indian Civil Rights Act. The Solicitor's memorandum is hereby incorporated into my decision.

Other challenges to the Hopi ordinance included arguments that it violates the Interstate Commerce Clause and

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that the Hopi constitution does not expressly authorize the tribe to tax. The Solicitor did not address these issues. Their resolution is not necessary to my decision, which rests solely on the grounds that the ordinance is violative of the Navajo and Hopi Settlement Act and the due process provision of the Indian Civil Rights Act.

This decision is final for the Department.

Sincerely,

/s/ KEN SMITH
Assistant Secretary -
Indian Affairs

Enclosure